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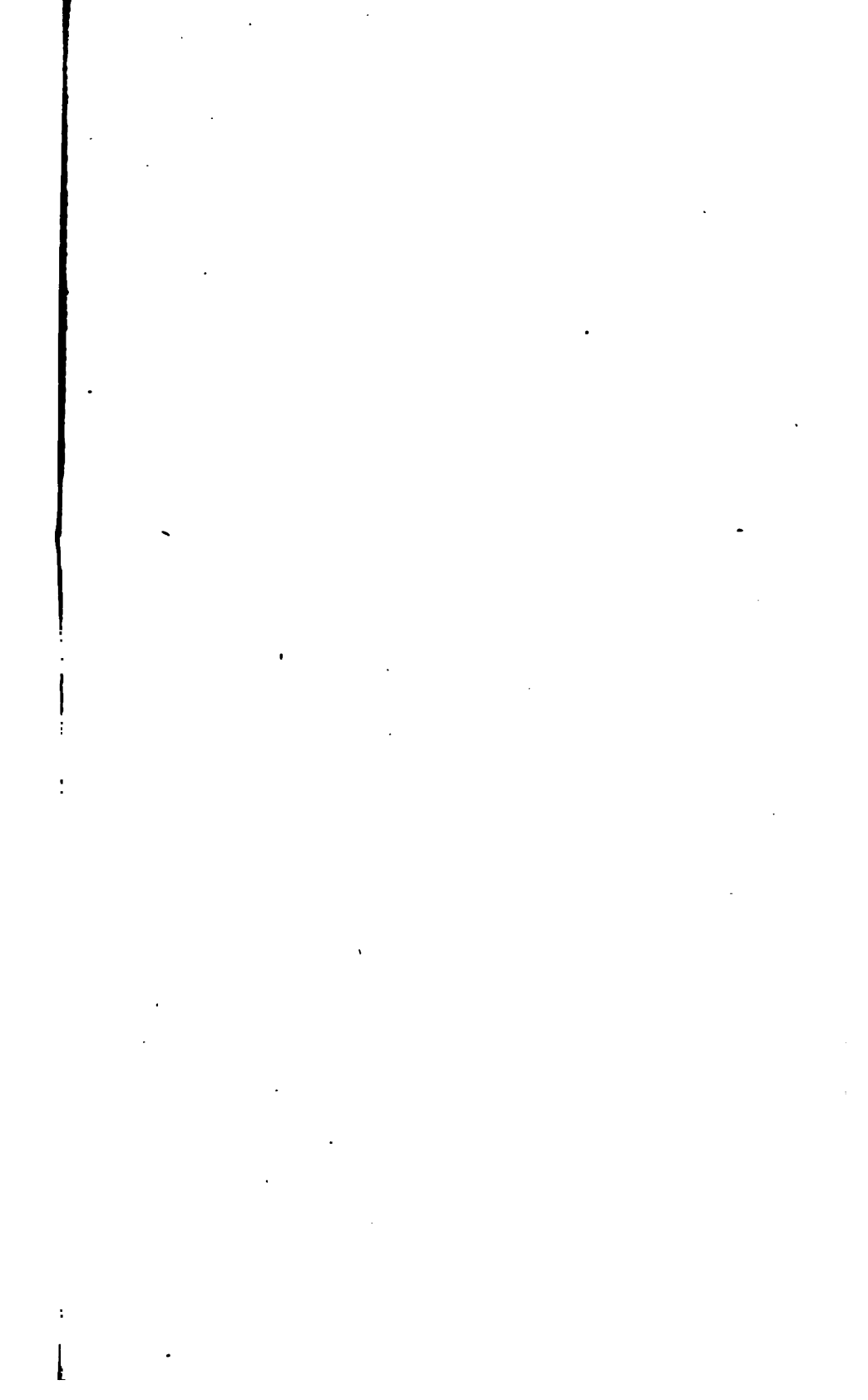
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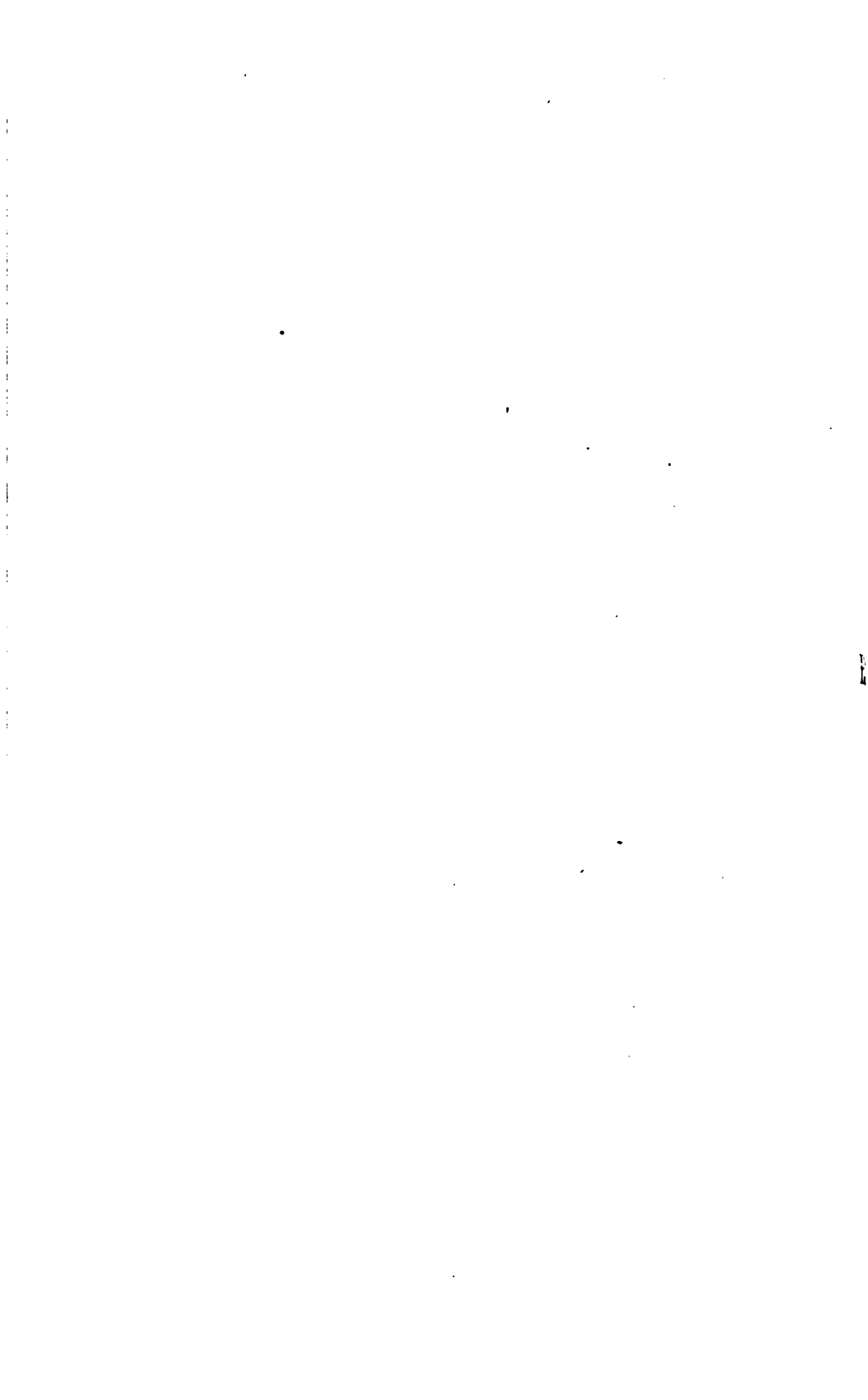
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RIGHTS, REMEDIES, AND PRACTICE.

RIGHTS, REMEDIES,
AND
PRACTICE,
AT LAW, IN EQUITY, AND UNDER THE CODES.
A TREATISE ON
AMERICAN LAW
IN CIVIL CAUSES;
WITH
A DIGEST OF ILLUSTRATIVE CASES.

BY
JOHN D. LAWSON,
AUTHOR OF WORKS ON PRESUMPTIVE EVIDENCE, EXPERT EVIDENCE, CARRIERS,
USAGES AND CUSTOMS, DEFENSES TO CRIME, ETC

IN SEVEN VOLUMES.

VOL. II.

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PREFACE.

THE general law as to Corporations will be found in Volume I.; that pertaining to particular business corporations, to Eleemosynary Institutions, and Voluntary Associations is given in this volume, together with the personal relations of Partnership, Husband and Wife, Parent and Child, Guardian and Ward, and Executors and Administrators.

J. D. L.

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TITLE II.
CORPORATIONS.

(CONTINUED.)

PARTICULAR BUSINESS CORPORATIONS.
VOLUNTARY ASSOCIATIONS.
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PART II. — BANKS.

CHAPTER XXIX.

BANKS AND BANKING.

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§ 509. **What are Banks — The Different Classes of.** — A banker is a dealer in capital,—an intermediate party between the borrower and lender.¹ He borrows of one party and lends to another, and the difference between the terms

¹ 1 McCulloch Com. Dict. 86.

at which he borrows and lends is the source and measure of his profits.¹ Banks are of three kinds, viz., banks of deposit, banks of discount, and banks of circulation;² all or any one of these three functions may be exercised by the same person or association, and an institution which exercises but one of them is nevertheless a "bank" in a commercial sense.³ As it is used in statutes, the word "bank" applies only to those associations which issue paper to circulate as money.⁴ Thus the section of the Iowa constitution making every stockholder in a banking corporation liable for the corporate debts was held to apply to such banks only as issue bills to circulate as money.⁵ So the Ohio constitution, providing that "no act of the general assembly authorizing associations with banking powers shall take effect" until submitted to the people, refers only to banks of issue.⁶ So the Kansas constitution, requiring any "banking law" to be submitted to a vote of the electors, applies to banks of issue, and not to banks of deposit and discount.⁷ A corporation engaged in loaning its own money upon note and mortgage is not a banking corporation.⁸ A foreign corporation chartered to engage in the express business, and to draw drafts and bills of exchange, or buy and sell the same, in the course of such business, is not a "banking corporation," which under the statute of Washington Territory is prohibited from doing business there.⁹ In the federal statutes,

¹ 1 McCulloch Com. Dict. 86; Curtis v. Leavitt, 15 N. Y. 9.

² People v. Utica Ins. Co., 15 Johns. 358; 8 Am. Dec. 243; Bank v. Collector, 3 Wall. 495.

³ Bank v. Collector, 3 Wall. 495; Warren v. Shook, 91 U. S. 704.

⁴ Sonoma County Bank v. Fairbanks, 52 Cal. 196.

⁵ Allen v. Clayton, 63 Iowa, 11; 50 Am. Rep. 716.

⁶ Dearborn v. Northwestern Savings Bank, 42 Ohio St. 617; 51 Am. Rep. 851; Bates v. People's Savings and Loan Ass., 42 Ohio St. 655.

⁷ Pape v. Capitol Bank of Topeka, 20 Kan. 440; 27 Am. Rep. 183.

⁸ Oregon and Washington Trust etc. Co. v. Rathbun, 5 Saw. 32.

⁹ Wells v. R. R. Co., 23 Fed. Rep. 469; 10 Saw. 441. The United States Trust Co. of New York is not a corporation created for banking purposes, within the meaning of the New York constitution. The word "banking" is there used in its familiar and popular sense, and means that business which might be carried on by banking associations under the general law: United States Trust Co. v. Brady, 20 Barb. 119.

"banks of issue" do not embrace savings and deposit banks.¹ The name "bank" imports a corporation, and a statute referring to a bank by name may be deemed a legislative recognition of its corporate existence.² An individual banker, under the New York acts, is not a corporation.³

§ 510. Who may Engage in Banking—Incorporation—Regulation by State.—At common law, the right of banking belongs to every citizen,⁴ and may be exercised by them at their pleasure until forbidden by legislative enactment.⁵ A provision in the constitution of a state, which purports to be nothing more than a restriction on the power of the legislature in reference to banking, will not be construed by the courts of the United States, in the absence of any declared policy of legislation or judicial decision in such state, to be intended as a restriction on the right of individuals or foreign corporations to deal in exchange.⁶ But the state may regulate and restrain this right.⁷ It may inspect the affairs of a bank by officers appointed by it.⁸ A statute making the directors of a bank responsible for its debts in case of insolvency is within this power.⁹ The charter of a banking corporation, which provides "that if the corporation shall fail to go into operation, or shall abuse or misuse their privileges under the charter, it shall be in the power of the legislative assembly at any time to annul, vacate, and make void this charter," may be repealed by the legislature without any judicial proceeding or prior notice

¹ *Clarion Nat. Bank v. Gruber*, 87 Pa. St. 468.

² *Williams v. Union Bank*, 2 Humph. 339.

³ *Codd v. Rathbone*, 19 N. Y. 37.

⁴ *Bank of Augusta v. Earle*, 13 Pet. 519.

⁵ *Nance v. Hemphill*, 1 Ala. 551.

⁶ *Bank of Augusta v. Earle*, 13 Pet. 519, 596.

⁷ *Attorney-General v. Utica Ins. Co.*, 2 Johns. Ch. 371; *Bank v. Earle*, 13 Pet. 519; *People v. Bartow*, 6 Cow. 290; *Curtis v. Leavitt*, 15 N. Y. 9.

⁸ *Wells v. Coleman*, 53 Cal. 416; *Com. v. Farmers' etc. Bank*, 21 Pick. 542; 32 Am. Dec. 290.

⁹ *Cummings v. Spanhust*, 5 Mo. App. 21.

to the corporation.¹ On a judgment of forfeiture against a bank, all assets consisting of credits or debts due to it, chattels, and real estate, become a trust fund for the sole purpose of paying the debts due by the bank at the time of its dissolution.²

Banks are now usually corporations created by the state, either under a special charter³ or a general law.⁴ But banking powers to be exercised by corporations must be expressly granted;⁵ and a charter which contains no allusion to banking powers does not confer them by implication from the fact that it creates a corporation with a money capital.⁶ A bank charter is a contract between the state and the stockholders, and no subsequent statute can impair its obligation.⁷ A bank is a private corporation, and its charter a private act, to be pleaded and proven as all other private acts.⁸ All securities given to an unauthorized banking company are void;⁹ but carrying on banking operations contrary to a statute is not such a mischief or nuisance that the chancellor would grant an injunction to restrain it, even though he had general jurisdiction over public nuisances.¹⁰ A bank is not, like a common carrier or innkeeper, bound to receive on deposit or keep the funds of every one who offers money to it for that purpose. It may choose its customers, like a private dealer.¹¹

§ 511. Powers of Banks.—Banks possess such powers as are expressly given them by charter, or by the statute

¹ *Miners' Bank of Dubuque v. United States, Morris*, 482; 43 Am. Dec. 115.

² *Coulter v. Robertson*, 24 Miss. 278; 57 Am. Dec. 168.

³ *Com. v. U. S. Bank*, 2 Ashm. 349; *State v. Bank*, 26 La. Ann. 288; *Farrington v. Tennessee*, 93 U. S. 679.

⁴ *Robinson v. Bank*, 21 N. Y. 406; *Curtis v. Leavitt*, 15 N. Y. 9; *Bank v. Smith*, 33 Mo. 364; *State v. Lehre*, 7 Rich. 234.

⁵ *State v. Wash. Library*, 11 Ohio, 96.

⁶ *State v. Stebbins*, 1 Stew. 287.

⁷ *Logwood v. Huntsville Bank*, Minor, 23; *State v. Tombeckbee Bank*, 2 Stew. 30; *Michigan State Bank v. Hastings*, 1 Doug. (Mich.) 225; 41 Am. Dec. 549; *Planters' Bank v. Sharp*, 6 How. 301.

⁸ *Clarion Nat. Bank v. Gruber*, 87 Pa. St. 468.

⁹ *Myers v. Manhattan Bank*, 20 Ohio, 283.

¹⁰ *Attorney-General v. Union Ins. Co.*, 2 Johns. Ch. 377; *Attorney-General v. Bank*, 1 Hopk. Ch. 354.

¹¹ *Thatcher v. Bank*, 5 Sand. 121.

under which they are operating, and such implied powers as are necessary to the proper exercise of those expressly given.¹ Banking powers cannot be inferred from such a general grant of power in the charter as "to hold any estate, real or personal, and the same to sell, grant, dispose of, or bind by mortgage, or in such other manner as they shall deem most proper for the best interest of the corporation."² A grant of a portion of the ordinary banking powers—e. g., a grant to a life insurance and trust company of a power "to buy and sell drafts and bills of exchange"—does not confer the power to issue paper designed to circulate as money.³

Banks have implied power to borrow money;⁴ to appoint agents;⁵ to issue evidences of debts lawfully made;⁶ to transfer a security held by it to secure a debt owing by such corporation;⁷ to loan money and discount notes, deducting interest in advance;⁸ to make an assignment of its property for creditors;⁹ to sell its property;¹⁰ to transfer by indorsement or delivery negotiable notes;¹¹ to take and hold stock and bonds as collateral security.¹² Power to purchase and traffic in promissory notes, as a species of personal property, does not belong to any bank

¹ *Barnes v. Bank*, 19 N. Y. 152; *Weckler v. Bank*, 42 Md. 581; 20 Am. Rep. 95; *Bliss v. Anderson*, 31 Ala. 612; 70 Am. Dec. 511; *Hughes v. Bank*, 5 Litt. 45; *Duncan v. Sav. Inst.* 10 Gill & J. 299; *Lathrop v. Bank*, 8 Dana, 114; 33 Am. Dec. 481; *Merchants' Bank v. Harrison*, 39 Mo. 433; 93 Am. Dec. 285.

² *State v. Granville Alexandrian Society*, 11 Ohio, 1; *State v. Library Co.*, 11 Ohio, 96; *Blair v. Perpetual Ins. Co.*, 10 Mo. 559; 47 Am. Dec. 129.

³ *Matter of Ohio Life Ins. & Trust Co.*, 9 Ohio, 291; *Duncan v. Maryland Savings Institution*, 10 Gill & J. 299.

⁴ *Curtis v. Leavitt*, 15 N. Y. 9; *Talman v. Bank*, 18 Barb. 123; *Union Mining Co. v. Rocky Mt. Nat. Bank*, 2 Cold. 248; *Donnell v. Lewis Co. Bank*, 80 Mo. 165.

⁵ *Bates v. Bank*, 2 Ala. 451; *Planters' Bank v. Andrews*, 8 Port. 404.

⁶ *Magee v. Company*, 5 Cal. 258; *Rockwell v. Bank*, 13 Wis. 653; *Barnes v. Ontario Bank*, 19 N. Y. 152.

⁷ *Gillett v. Campbell*, 1 Denio, 520.

⁸ *State v. Boatman's Sav. Inst.* 48 Mo. 189; *Fleckner v. Bank*, 8 Wheat. 338; *Bank v. Collector*, 3 Wall. 495.

⁹ *Arthur v. Com. Bank*, 9 Smedes & M. 394; 48 Am. Dec. 719; *State v. Com. Bank*, 13 Smedes & M. 569; 53 Am. Dec. 106.

¹⁰ *Planters' Bank v. Sharp*, 6 How. 301.

¹¹ *Cooper v. Curtis*, 30 Me. 488; *White's Bank v. Ins. Co.*, 12 Ohio St. 601; *Marvine v. Hymers*, 12 N. Y. 233.

¹² *Dearbourn v. Bank*, 58 Me. 273; *Third Nat. Bank v. Boyd*, 44 Md. 47; 22 Am. Rep. 35; *Trenton Banking Co. v. Woodruff*, 2 N. J. Eq. 117.

as a necessary incident to its existence, or to the exercise of any of its powers as a bank of circulation and deposit alone.¹ The mother bank has a right to receive payment of any debt due the branch.² So the parent bank may ratify acts of the branch bank, where the latter discounts a note without a competent board of directors.³ Where a bank purchases its own stock to protect itself from loss, it may sell said stock on credit, and take the purchaser's note with the stock as collateral security.⁴ A banking house may prescribe reasonable rules and hours of business within which its peculiar business with the public shall be done; but the reception or delivery of packages is not a matter peculiar to the banking business, and a bank has no right to declare that it will not receive packages from a common carrier after what it pleases to call "banking hours," and thereby thrust upon him a further continuance of his extraordinary responsibility.⁵ A bank does not exceed its corporate powers in doing whatever is necessary to render productive property which it has taken for debt.⁶

But a bank has no implied power to deal in stock and bonds for profit,⁷ or to subscribe for railroad stock.⁸ It cannot maintain suit on a note given to it without consideration, for the purpose of making a colorable and false statement of the condition of its assets.⁹ Where a bank is located in one county by its charter, it violates its charter by establishing an agency in another county,

¹ *Farmers etc. Bank v. Baldwin*, 23 Minn. 198; 23 Am. Rep. 683. A promissory note executed to a banking corporation in payment of a subscription to its capital stock is not void: *Pac. Trust Co. v. Dorsey*, 72 Cal. 55.

² *Smith v. Lawson*, 18 W. Va. 212.

³ *Planters' Bank v. Sharp*, 4 Smedes & M. 75; 43 Am. Dec. 470.

⁴ *Union Bank v. Hunt*, 7 Mo. App. 42.

⁵ *Marshall v. Am. Ex. Co.*, 7 Wis. 1; 73 Am. Dec. 381.

⁶ *Reynolds v. Simpson*, 74 Ga. 454.

⁷ *Fleckner v. Bank*, 8 Wheat. 338; *Sackett's Harbor Bank v. Bank*, 11 Barb. 213; *Portland Bank v. Storer*, 7 Mass. 433; *First Nat. Bank v. Nat. Ex. Bank*, 39 Md. 600.

⁸ *Nassau Bank v. Jones*, 95 N. Y. 115; 47 Am. Rep. 14.

⁹ *Agricultural Bank v. Robinson*, 24 Me. 274; 41 Am. Dec. 385.

where it receives deposits and buys and sells exchange.¹ A power to discount notes gives power to purchase them.² A power "to deal in bills of exchange" includes authority to take bills of exchange for collection merely, and does not restrict the bank to buying and selling bills.³ Where a statute authorizes a bank to hold as much real property as may be requisite for its immediate accommodation, in relation to the convenient transaction of its business, and no more, the bank may purchase more land than is necessary for the erection of a banking house, build fire-proof houses on so much as shall not be necessary for the banking house, for the greater security of the bank building, and sell them to third persons.⁴ Authority given to a bank by its charter to take real estate in payment of its debts, either by conveyance or purchase under judgments in its favor, includes the power of selling and conveying the same.⁵ It has power to discharge a debt and mortgage and take another in payment, under an act which provides that it shall not exercise the usual banking powers, but shall "confine all its operations to winding up its affairs, collecting and securing its debts, paying the debts of the bank, selling its real and personal estate," etc.⁶ A provision in a bank charter, that "advancements may be made," etc., "taking liens," etc., contemplates that the two should be contemporaneous acts; and not that the bank, at any time after making an advancement, could take a lien on all future purchases of the mortgagor, for a general balance due on such advancements.⁷ Where its charter authorizes it to reissue surrendered stock and invest the proceeds in bonds and mortgages, it may sell such stock directly for bonds and mortgages.⁸ A mortgage

¹ *People v. Oakland County Bank*, 1 Doug. (Mich.) 282.

² *Jackson v. Brown*, 5 Wend. 590.

³ *Ryan v. Dunlap*, 17 Ill. 40; 63 Am. Dec. 335.

⁴ *Pape v. Capitol Bank*, 20 Kan. 440; 27 Am. Rep. 183.

⁷ *Bank of New Hanover v. Williams*, 79 N. C. 129.

⁵ *Branch Bank v. Knox*, 1 Ala. 148.

⁶ *Banks v. Poitiaux*, 3 Rand. 136; 15 Am. Dec. 706.

⁸ *Insurance and Trust Co. v. Lanier*, 5 Fla. 110; 58 Am. Dec. 449.

made directly to a bank, and not to the president thereof or other officer, is valid, under a statute which authorizes a banking association to hold and convey such real estate as may be mortgaged to it in good faith by way of security for loans, etc.; although the statute further provides that all conveyances shall be made to the president or such other officer as may be indicated for that purpose in the articles of association, and the articles of association of such bank name the president as such officer.¹ A charter provision that no director or officers shall borrow any of the funds of the bank does not prevent the bank from recovering a loan made to a partnership, because one of its members is an officer or stockholder in the bank.² A bank, restricted by its charter to dealings in commercial paper, is not thereby prohibited from taking an assignment from a vendor of real estate of the purchaser's agreement to pay the purchase-money, where the taking of such assignment is necessary to secure a debt previously contracted.³ For bank directors to give a mortgage to a depositor to secure repayment of his deposits does not violate a prohibition that the directors shall not increase the indebtedness of the bank without consent of the stockholders.⁴ A bank that is prohibited, by its charter, from vesting, using, or improving any of its moneys, goods, etc., in trade or commerce, may nevertheless lawfully take notes payable in bills of other banks, and receive such bills at a discount in payment for their notes.⁵ The provision in a charter that "the corporation shall not, directly or indirectly, deal or trade in anything except bills of exchange, promissory notes, gold or silver bullion, or the sale of goods which shall be the produce of its lands," does not restrain the bank from taking an assignment of a mortgage to secure a debt to the bank.⁶

¹ *Kennedy v. Knight*, 21 Wis. 340;
94 Am. Dec. 543

⁴ *Ahl v. Rhoads*, 84 Pa. St. 319.

² *Fisher v. Mardock*, 13 Hun, 485.

433.

³ *Lagow v. Badollet*, 1 Blackf. 416;
12 Am. Dec. 258.

⁶ *Trenton Banking Co. v. Woodruff*, 2
N. J. Eq. 117.

⁵ *Portland Bank v. Storer*, 7 Mass.

ILLUSTRATIONS.—A bank was chartered, with power “to carry on the business of receiving money on deposit, and to allow interest thereon, giving to the person depositing credit therefor.” *Held*, that this language did not confer upon the bank the power to receive special deposits: *First Nat. Bank v. Citizens’ Bank*, 2 Cent. L. J. 757. A bank was authorized “to carry on the business of banking, by discounting bills, notes, and other evidences of debt, . . . and by exercising such incidental powers as necessary to carry on its business.” *Held*, that this gave no power to buy promissory notes, and it could not recover on notes purchased by it: *Farmers’ etc. Bank v. Baldwin*, 23 Minn. 198; 23 Am. Rep. 683. A bank was authorized to hold real estate for the accommodation of its business only, except when received *bona fide* as security, or in payment of a pre-existing debt, or as purchaser on an execution in its own favor. *Held*, that the bank had not authority to buy land to sell again: *Bank of Michigan v. Niles*, 1 Doug. (Mich.) 401; 41 Am. Dec. 575. A bank at Columbus, Ohio, had power, by its charter, to deal in bills of exchange, without restriction as to place. *Held*, that it could purchase such bills at Cleveland, Ohio, for the purpose of remitting to New York the proceeds of paper belonging to the bank, collected at Cleveland, and that it could deal generally in exchange at Cleveland, through an agent there, with the funds thus collected and remitted: *City Bank of Columbus v. Beach*, 1 Blatchf. 425. The charter of a bank authorized it to have, hold, purchase, and retain lands, etc., and to sell them, “provided that such lands, which the said corporation are hereby enabled to *purchase and hold*, shall extend only to lots, etc., necessary for the business of the bank.” *Held*, that the bank might *purchase* land in a distant county, though it could retain only an estate defeasible by the commonwealth: *Leazure v. Hillegas*, 7 Serg. & R. 313. A bank was authorized by charter to take seven per cent interest on notes payable within four months, and eight per cent on those for longer time. *Held*, that a note payable four months after date (with grace) was entitled to but seven per cent interest: *Forniquet v. R. R. Co.*, 7 Miss. 116. A bank took an assignment, under seal, of a contract for the sale of real estate by a pre-existing debtor of the bank, and the payment of the purchase-money by the purchaser, as collateral security for the debt. *Held*, that the transaction could not be avoided on the ground that the bank was restricted by its charter to dealing in commercial paper: *Lagow v. Badollet*, 1 Blackf. 416; 12 Am. Dec. 258. A general banking law contained a provision in the following words: “Contracts made by any bank or banking association established under the provisions of this act, and all notes and

bills issued and put in circulation as money, shall be signed by the president and cashier thereof"; and a bank sold a draft which was signed by the president only, and was dishonored. *Held*, that the contracts referred to in the act were contracts intended to circulate as money only, and that the bank was liable on the draft: *Paine v. Stewart*, 33 Conn. 516. A bank, was prohibited by its charter from purchasing, holding, or conveying real estate, except in certain specified cases, and, among others, such lands "as shall have been purchased at sales upon judgments, decrees, or mortgages obtained or made for debts due the bank." *Held*, that the bank had no capacity, after the time for redeeming had expired, to purchase the interest of a judgment creditor, who, by virtue of its own judgment, had acquired the title of the purchaser of land sold under execution, though the bank held unsatisfied judgments against the debtor whose land had been sold: *Chautauqua County Bank v. Risley*, 4 Denio, 480. A banking institution had power to lend deposits on the public stock of the state or the United States on bond and mortgage, or "upon any other securities which should be deemed by the board of directors ample." *Held*, that it was not limited to the first-mentioned securities, but could discount commercial paper: *Detroit Sav. Bank v. Truesdail*, 38 Mich. 430. A bank, after it had suspended specie payments, agreed with one of its stockholders, that if he would pay up his bond and mortgage of five thousand dollars in advance, and deliver up his stock to the bank, to transfer to him five Arkansas bonds of one thousand dollars each, and then worth about eighteen per cent, which was done. *Held*, that the agreement was not void: *Gillet v. Moody*, 5 Barb. 185. A bank advanced to an individual a sum of money in its bills, marked for identification, exceeding ten per cent of its capital, and took from him bills of exchange for that amount, drawn by him on another person, payable at sight with five per cent interest; with an agreement that the circulation of the money so advanced should be protected by the person receiving it, and that from time to time, as the bank should redeem the bills, he should furnish them with exchange on New York for the amount of such redemptions, with six per cent interest on the same; and that the money so redeemed should be sent back to him on the receipt by the bank of the exchange therefor; and further, that if the agreement in regard to the circulation and redemption was carried out, payment of the drafts should not be required for one year. *Held*, that such transaction was a loan, and not a purchase of bills of exchange, within the meaning of a statute: *Farmers' Bank v. Burchard*, 33 Vt. 346.

§ 512. **Powers and Liabilities of Bank as Collecting Agent.**—A bank has an implied power to make collections upon business paper.¹ It may charge a commission for such service,² but if it does not, the use of the money while in its hands is considered a sufficient consideration for the promise to collect and remit.³ When a bank receives paper for collection, and no special agreement is made, the contract to be implied is one of agency merely,⁴ and the duties and liabilities of the bank are those of an agent of the holder or depositor.⁵ It has no right to sell the note.⁶ The bank is not the agent of the maker of the paper, and is not liable to him for a failure to account to the owner for the proceeds.⁷ If a note or other instrument is deposited for collection at the bank named in it as the place of payment, the bank becomes the agent of the payee, and not of the maker;⁸ but if the obligation be not presented at the bank for payment on the day of maturity, and the maker deposits money with the bank to meet it, then the bank becomes the agent of the maker, and not of the payee.⁹ A bank receiving a draft for collection is liable to the true owner, in an action for money had and received, provided notice of such ownership is given before the proceeds are paid over to the depositor of the draft.¹⁰ A bank receiving a check for collection has, according to the general common-law rule, until the close of banking hours on the next business day in which to present it.¹¹ But a general usage to present it within a shorter

¹ *Tyson v. State Bank*, 6 Blackf. 225; 38 Am. Dec. 139.

² *Halls v. Bank*, 3 Rich. 366.

³ *Smedes v. Bank*, 20 Johns. 372; *Halls v. Bank*, *supra*.

⁴ *Montgomery Co. Bank v. Albany City Bank*, 7 N. Y. 459; *Bank of Mobile v. Huggins*, 3 Ala. 206.

⁵ *Bank of Mobile v. Huggins*, 3 Ala. 206; *Alley v. Rogers*, 19 Gratt. 366; *Daly v. Butchers' etc. Bank*, 56 Mo. 94; 17 Am. Rep. 663.

⁶ *Fuller v. Bennett*, 55 Mich. 357.

⁷ *Smith v. Essex County Bank*, 22 Barb. 627.

⁸ *Ward v. Smith*, 7 Wall. 447.

⁹ *Ward v. Smith*, 7 Wall. 447.

¹⁰ *Union Bank v. Johnson*, 9 Gill & J. 297.

¹¹ *Lawson on Usages and Customs*, 209; *Rickford v. Ridge*, 2 Camp. 537; *Moule v. Brown*, 4 Bing. N. C. 266; *Boddington v. Schlenker*, 4 Barn. & Adol. 752; *Alexander v. Burchfield*, 7 Man. & G. 1061; *Hare v. Henty*, 10 Com. B. N. S., 65.

or a longer time will qualify this rule,¹ provided it were general and well understood.² A bank acting as the collecting agent of another has no right to receive in payment anything but money. If, instead of money, it takes a check and surrenders the paper, it assumes the responsibility of the paper becoming good, and if it turns out otherwise, it is liable.³ But it may prove as a defense a usage to act in this manner.⁴ A bank receiving from another bank a bill or note for collection is bound to present the same for payment, and if the same is not paid at maturity, to give due notice of the dishonor to the bank from which the note was received.⁵ It need not, as a matter of law, notify all the indorsers,⁶ yet such a duty may be cast upon it by agreement or by usage and custom.⁷ A custom among banks of transmitting bills and notes from each to the other for collection, and when paid, of passing the proceeds to the credit of the bank so transmitting them, and to the debit of the bank so receiving them, cannot affect the claim of a third person to the proceeds of a bill which he has committed to one of them for collection.⁸ The rule that where commercial paper is placed in a bank for collection the title thereto does not pass to the bank, nor does it become the customer's debtor for the amount until the collection is made, is not affected by a practice of the bank allowing customers to draw against such deposits before the collections have actually been made.⁹

¹ *Boddington v. Schlencker*, 4 Barn. & Adol. 752; *Morse on Banks*, 393.

² *Rickford v. Ridge*, 2 Camp. 537; *Mohawk Bank v. Broderick*, 13 Wend. 133; 27 Am. Dec. 192.

³ *Com. Bank v. Union Bank*, 11 N. Y. 203; *Levy v. Nat. Bank*, 7 Cent. L. J. 249.

⁴ *Levy v. Nat. Bank*, *supra*; *Russell v. Hankey*, 6 Term Rep. 12.

⁵ *Phipps v. Millbury Bank*, 8 Met. 79.

⁶ *Haynes v. Berks*, 3 Bos. & P. 599;

Bank of Mobile v. Huggins, 3 Ala. 206;

Branch Bank v. Knox, 1 Ala. 148;

Phipps v. Millbury Bank, 8 Met. 79;

Colt v. Noble, 5 Mass. 167; *Eagle Bank v. Chapin*, 3 Pick. 180; *Bank of the United States v. Goddard*, 5 Masson, 366; *State Bank v. Bank*, 41 Barb. 343; *Mead v. Engs*, 5 Cow. 303; *Howard v. Ives*, 1 Hill, 263; *Bank of the United States v. Davis*, 2 Hill, 451; *Spencer v. Ballou*, 18 N. Y. 327; *Farmers' Bank v. Vail*, 21 N. Y. 485.

⁷ *Smedes v. Bank of Utica*, 20 Johns. 372; 3 Cow. 362.

⁸ *Lawrence v. Stonington Bank*, 6 Conn. 521.

⁹ *Giles v. Perkins*, 9 East, 12; *Scott v. Ocean Bank*, 23 N. Y. 289.

After a collection made, the bank becomes a simple contract debtor to the depositor for the proceeds, and the amount may be properly passed to the credit of the depositor in his general account.¹ If a note deposited for collection is credited to the depositor in his general account, then overdrawn, and the bank fails, the proceeds are assets available to the general creditors,² notwithstanding the account was made good by other deposits prior to the collection of the note.³ A bank at which a negotiable note is payable, and with which it is deposited for collection, is the agent of the holder or depositor to receive the money if paid at the maturity of the note, and has implied authority to receive the money at any time thereafter, and while the note remains at the bank. Often such a note is taken up at a bank shortly after the protest thereof, and with a view to save the credit of a debtor; and therefore, often a protested note is suffered by the owner to remain at bank some time after protest, with a hope that it may be thus taken up. However long, and with whatever motive, a protested note is permitted by the owner to remain at bank, it may be paid to the bank by the debtor, provided he has no notice that the bank has no authority to receive the money.⁴ An agreement between two banks that all commercial paper, forwarded by one to the other for collection, shall be held as collateral security for overdrafts by the forwarding bank, does not give the collecting bank a lien upon such paper unless that bank has made specific advances thereon.⁵ Where two banks keep running accounts with each other, and one of them, holding drafts of the other for collection, fails to pay over money received thereon, the remedy is against the defaulting bank, and not against the drawer of the draft.⁶ Money collected by one bank

¹ *Marine Bank v. Ruahmore*, 28 Ill. 463; *In re Bank of Madison*, 5 Biss. 515.

² *In re Bank of Madison*, 5 Biss. 515.

³ *In re Bank of Madison*, *supra*.

⁴ *Alley v. Rogers*, 19 Gratt. 366.

⁵ *Dod v. National Bank*, 59 Barb. 265.

⁶ *Kupfer v. Bank*, 34 Ill. 328; 85 Am. Dec. 309.

for another, placed by the collecting bank with the bulk of its ordinary banking funds, and credited to the transmitting bank in account, becomes the money of the former as a general deposit. Hence, any depreciation in the specific bank bills received by the collecting bank, which may happen between the date of the collecting bank's receiving them and the other bank's drawing for the amount collected, falls upon the former.¹ A bank does not become a purchaser for value of demands remitted to it for collection, by reason of its having a balance against the remitting bank, for which it has refrained from drawing, and of its having discounted notes for the latter upon its indorsement in reliance upon a course of dealing between the banks to collect notes for each other, each keeping an open account of the collections, treating all the paper sent for collection as the property of the other, and drawing for balances at pleasure.² The collecting bank is liable to the original owner, and cannot set off a claim against the transmitting bank from which the bill was received.³ A bank which receives in pledge as security for a loan, and undertakes to collect for another party lottery tickets which have won prizes, and consigns them to its own correspondent for collection, is responsible to its principal for the amount of commission which its correspondent or agent has overcharged for the collection of such values.⁴ Where a negotiable instrument indorsed and delivered in blank to a bank, though in fact only for collection, is sent by it to another bank for "collection and credit" before maturity, and the latter receives it without notice that it does not belong to the former, it may lawfully retain the proceeds of the collection to satisfy a claim for a general balance against the other bank, if that balance has been allowed

¹ *Marine Bank v. Fulton Bank*, 2 Wall. 252.

² *McBride v. Farmers' Bank*, 26 N. Y. 450.

³ *Lawrence v. Stonington Bank*, 6 Conn. 521.

⁴ *Masich v. Citizens' Bank*, 34 La. Ann. 1207.

to arise and remain on the faith of receiving payments from such collections pursuant to a usage between the two banks.¹ The proceeds of a draft delivered to a banker for collection are a trust fund in his hands, and in case of his insolvency, the drawer may enforce payment in full from his assignee, to the exclusion of other creditors, although the proceeds cannot be traced to any specific property.²

A bank receiving negotiable paper for collection is bound to exercise reasonable care and diligence in the discharge of its assumed duties; and whether payable at its counter or elsewhere, is liable for any neglect of duty occurring in its collection, by which any of the parties are discharged.³

¹ *Vickrey v. State Sav. Ass.*, 21 Fed. Rep. 773.

² *McLeod v. Evans*, 66 Wis. 401; 67 Am. Rep. 289.

³ See title Negotiable Paper, Division III.; *Armington v. Gas Light Co.*, 15 La. 414; 35 Am. Dec. 205; *Tyson v. State Bank*, 6 Blackf. 225; 38 Am. Dec. 129; *Com. Bank v. Hamer*, 7 How. (Miss.) 448; 40 Am. Dec. 80. A bank receiving paper for collection employs a notary or another bank in the place where the payee resides. As to the liability in this case, the courts are divided in opinion: See title Negotiable Paper, Div. III. The courts of England, New York, Ohio, Indiana, Maryland, and South Carolina fix the liability for the negligence or other act upon the bank receiving the collection: *Van Wart v. Wooley*, 3 Barn. & C. 439; *Allen v. Merchants' Bank*, 22 Wend. 215; 34 Am. Dec. 289; *Montgomery Bank v. Albany Bank*, 7 N. Y. 459; *Commercial Bank v. Union Bank*, 11 N. Y. 203; *Reeves v. State Bank of Ohio*, 8 Ohio St. 465; *Young v. Noble*, 2 Disn. 485; *American Express Co. v. Haire*, 21 Ind. 4; 83 Am. Dec. 334; *Citizens' Bank of Baltimore v. Howell*, 8 Md. 530; 63 Am. Dec. 714; *Mechanics' Bank v. Earpe*, 4 Rawle, 384; *Thompson v. Bank of South Carolina*, 3 Hill (S. C.) 77; 30 Am. Dec. 354; *Taber v. Perrot*, 2 Gall. 565; *Tyson v. State Bank*, 6 Blackf. 225; 38 Am. Dec. 139; *Abbott v. Smith*, 4 Ind. 452; while the courts of Massachusetts,

Pennsylvania, Connecticut, Louisiana, Illinois, Missouri, Mississippi, Iowa, and Tennessee hold the collecting bank alone responsible to the owner for its own negligence: *Fabens v. Mercantile Bank*, 23 Pick. 330; 34 Am. Dec. 59; *Dorchester and Milton Bank v. New England Bank*, 1 Cush. 177; *Warren Bank v. Suffolk Bank*, 10 Cush. 583; *East Haddam Bank v. Scovil*, 12 Conn. 303; *Jackson v. Union Bank*, 6 Har. & J. 146; *Baldwin v. Bank of Louisiana*, 1 La. Ann. 13; 45 Am. Dec. 72; *Bellemire v. Bank of United States*, 4 Whart. 105; 33 Am. Dec. 46; *Ætna Ins. Co. v. Alton City Bank*, 25 Ill. 243; 79 Am. Dec. 328; *Daly v. Butchers' and Drovers' Bank*, 56 Mo. 94; 17 Am. Rep. 663; *Farmers' Bank of Virginia v. Owen*, 5 Cranch C. C. 504; *Third Nat. Bank v. Vicksburg Bank*, 61 Miss. 112; 48 Am. Rep. 78; *Guelich v. National Bank*, 56 Iowa, 434; 41 Am. Rep. 110; *Bank of Louisville v. National Bank*, 8 Baxt. 101; 35 Am. Rep. 691. As to the liability for the acts of the notary who is employed to make demand and protest, the same difference of opinion exists: *Gerhardt v. Boatmen's Savings Inst.*, 38 Mo. 60; 90 Am. Dec. 407; *Agricultural Bank v. Commercial Bank*, 7 Smedes & M. 592; *Ayrault v. Pacific Bank*, 47 N. Y. 570; 7 Am. Rep. 489; *American Express Co. v. Dunlevy*, 3 Am. Law Reg. 266; *Governor to Use, etc. v. Gordon*, 15 Ala. 72; *Hyde v. v. Planters' Bank*, 17 La. 560; 36

A bank is responsible for mistaking the date of a note received for collection, when owing to such mistake the note was presented for payment before the proper time, and the indorser discharged.¹ Where a bank acting as the collecting agent of certain sight and time drafts, having control of the grain against which they are drawn, and being instructed to deliver it to the consignees upon payment of the drafts, and otherwise to hold it for instructions, delivers the grain to the consignees, upon the payment of the sight-drafts, but before the payment of the time-drafts, and the consignees became insolvent before the maturity of the time-drafts, the delivery, under such circumstances, is evidence of a want of due diligence on the part of the bank as a collecting agent.² It is not within the scope of a collecting bank's agency to employ counsel and bring suit upon paper left with it for collection.³ A bank employing an attorney to sue on a note is not liable for the failure of the attorney to obtain judgment on it as soon as another attorney employed by another bank for a similar purpose, where it is not pretended that an improper choice was made by the bank, nor any reason for charging the attorney employed with

Am. Dec. 621; *Bellemire v. Bank of United States*, 1 Miles, 173; 4 Whart. 105; 33 Am. Dec. 46; *Citizens' Bank v. Howell*, 8 Md. 530; 63 Am. Dec. 715; *Smedes v. Bank of Utica*, 20 Johns. 372; *Tiernan v. Com. Bank*, 7 How. (Miss.) 648; 40 Am. Dec. 83; *Gallapolis Bank v. Butler*, 41 Ohio St. 519; 52 Am. Rep. 94; *Allen v. Merchants' Bank*, 22 Wend. 215, 34 Am. Dec. 289, the court saying: "If this laches had been committed by that officer in that part of his duty which was peculiarly official, and could only be performed by himself or some other notary, he having been requested or instructed to perform such duty, I doubt whether the collecting bank, or any other institution or person employing him, would be responsible for his neglect in that which was not voluntarily confided to

him, but wherein his official duties were rendered necessary by the requirements of the law, and where his employer had done all that was within his power for the performance of the original undertaking. Then it would seem that the notary would alone be responsible." But the contrary is held in *Missouri: Gerhard v. Boatmen's Sav. Inst.*, 38 Mo. 60; 90 Am. Dec. 407. In a very recent case the supreme court of the United States held that the notary is the agent of the holder of the note, and not of the bank: *Britton v. Nicholls*, 104 U. S. 757.

¹ *Bank of Delaware County v. Broomhall*, 38 Pa. St. 135; 80 Am. Dec. 471.

² *Milwaukee Nat. Bank v. City Bank*, 103 U. S. 668.

³ *Crow v. Bank*, 12 La. Ann. 602; *Wetherill v. Bank*, 1 Miles, 399.

neglect of duty.¹ One who sends a note to a bank for collection is bound by a usage of the bank to accept its certificates of deposit in lieu of cash.² The agency of the collecting bank terminates after demand of a note forwarded to it for collection; and a refusal to return the note is evidence of a conversion.³ Naming a bank as the place of payment of a promissory note, bill of exchange, or other obligation, does not make the bank an agent for the collection of the paper or the receipt of the money due on it; and the debtor cannot make the bank the agent of the holder by depositing with it the funds to pay the paper. If maturing paper be left at the bank for collection, the bank becomes the agent of the holder to receive payment. But unless the bank has been made the agent of the holder by indorsement of the paper or the deposit of it for collection, any money which the bank receives to apply in payment of it will be deemed to be money taken by the bank as the agent of the payor, and the loss sustained by the failure of the bank with the funds so deposited in hand will be the loss of the payor.⁴ The measure of damages in an action against a bank, to recover for the injury resulting from neglect of duty in the undertaking to collect, is the actual loss sustained by the party interested in the paper.⁵

ILLUSTRATIONS.—The defendant bank received from the plaintiff bank a sight-draft for collection drawn by the plaintiff on a third bank against funds actually to the credit of the drawer; the defendant received this draft for collection January 10th, and transmitted it directly to the drawee, its correspondent, on the same day. It ought to have reached the drawee in two days. The drawee continued good until January 29th, when it failed. The drawee did not acknowledge the receipt of the draft, and in fact the draft miscarried and never reached the

¹ *Commercial Bank v. Martin*, 1 La. Ann. 344; 45 Am. Dec. 87.

² *British etc. Mortgage Co. v. Tibballs*, 63 Iowa, 468.

³ *Potter v. Bank*, 28 N. Y. 641; 86 Am. Dec. 273

⁴ *Adams v. Hackensack Improvement Co.*, 44 N. J. L. 638; 43 Am. Rep. 406.

⁵ *Tyson v. Bank*, 6 Blackf. 225; 38 Am. Dec. 139; *McKinster v. Bank*, 9 Wend. 46; 11 Id. 473.

drawee. The defendant made no inquiry about it until February 9th. The plaintiff and defendant both supposed, meanwhile, that it had been paid. The defendant gave the plaintiff no notice of any kind in respect of the draft until February 11th. The plaintiff sued the defendant for its negligent omission to give it notice. *Held*, that the defendant was liable: *Trinidad Nat. Bank v. Nat. Bank*, 4 Dill. 290. A bank received a check upon itself for collection, being at the same time a large creditor of the drawer, and failed without excuse to notify the depositor of the non-payment of the check. *Held*, that the bank was chargeable with negligence: *Bank of New Hanover v. Kenan*, 76 N. C. 340. Plaintiff deposited a check with a bank for collection on the day before the bank failed. The check was not collected, and came into the possession of the receiver of the bank, who claimed the check as against plaintiff. *Held*, that plaintiff was entitled to its return, and that the fact that the bank had been in the habit of crediting such checks as cash, and allowing depositors to draw against them before collection, made no difference, such a practice existing merely by way of favor: *Balbach v. Frelinghuysen*, 15 Fed. Rep. 675. The defendant received a draft indorsed to his order "for collection on account of the City Bank of Houston." The prior indorsements showed that it had been remitted to that bank for collection on account of the plaintiff bank. The defendant collected the draft. The City Bank of Houston failed, indebted to the plaintiff and the defendant. *Held*, that the proceeds belonged to the plaintiff: *City Bank of Sherman v. Weiss*, 61 Tex. 331; 60 Am. Rep. 29. A note was made to G.'s order, indorsed by him, and sent through the house of B., a banker, for collection, and by B. indorsed to the defendant bank "for collection and credit." *Held*, that B. by the indorsement did not become the owner of the note, and had no right to pledge it, or direct its proceeds to be credited to him in payment of his indebtedness to the defendant: *First Nat. Bank v. Gregg*, 79 Pa. St. 384. In 1861 and 1862 a party deposited in a bank certain commercial paper which was to be collected, and its proceeds cared for, and did not request the bank not to collect in confederate currency; after the war he demanded what was due him. *Held*, that he had authorized the bank to collect in confederate money, and could only recover its value at the date of his demand: *Henry v. Northern Bank*, 63 Ala. 527. Two banks kept a running account with one another, each acting as collecting agent for the other. Each week a balance was struck and paid. The avails of collection were not kept separate or in any way distinguished from other funds. *Held*, that upon the failure of one bank the other acquired no lien on any specific fund, nor any preference over creditors generally: *People v. City Bank*,

93 N. Y. 582. A note falling due Sunday, July 4th, was by W. sent for collection to the bank where payable, and on July 3d the bank marked it paid, and sent to W. a draft for the proceeds. The maker then had in the bank a small balance to his credit, but not enough to pay the note. On July 6th the bank, hearing that the maker had failed, stopped payment of the draft, and claiming that it had been sent by mistake, requested W. to return it, which W. thereupon did. The bank also on July 6th protested it, and mailed notice to the indorser, dating both back to July 3d. *Held*, that the indorser being discharged, the bank was liable: *Whiting v. City Bank*, 77 N. Y. 363. A country bank sent an indorsed bill of exchange, payable in New York, to a bank at Albany for collection, and the Albany bank indorsing it sent it to a bank in New York for the same purpose. *Held*, that the Albany bank alone was answerable to the country bank for any negligence in presenting the bill, by which the indorser was released from his liability; and the New York bank was answerable to the country bank: *Montgomery County Bank v. Albany City Bank*, 7 N. Y. 459. The holders of a bill of exchange, payable in Washington, indorsed it, and intrusted it to the M. bank, to be transmitted to a bank in Washington for collection. The cashier of the M. bank indorsed it, and sent it to the bank of Washington, together with other bills, and without any statement of the ownership. *Held*, that the bank of Washington might be liable to the real owners of the bill for failure of duty in collecting: *Bank of Washington v. Triplett*, 1 Pet. 25. A bank holding a note for collection received the amount from an agent of the maker, and by mistake gave up to him a similar note of another person, and returned the first note to its owner, to whom the maker paid it on demand, and immediately, though four days after the payment to the bank, examined the note in his agent's hands, and discovering the mistake, returned it to the bank, and demanded back his money. *Held*, that he was entitled to it, with interest from the time of the demand, although the bank had meanwhile paid the amount to the owner of the other note, the maker of which was insolvent and the indorsers discharged for want of demand: *Andrews v. Suffolk Bank*, 12 Gray, 461. A bank received for collection a note payable in another state, under an agreement to collect it for seven per cent, and they neglected to give information of non-payment, and to return the note to the depositor within a reasonable time. *Held*, that they were liable: *Wingate v. Mechanics' Bank*, 10 Pa. St. 104. Bankers at A received for collection a note payable at B, and were notified that there were two persons of the same name as the indorser, one residing at A, and the other at B, and that the latter was the indorser, there being nothing on the face of the note to show

this. *Held*, that it was their duty to transmit these instructions to their correspondents at B, upon sending the note to them for collection, and that no custom could absolve them from this duty, which was of the very essence of their undertaking, namely, the fixing of the indorser's liability: *Borup v. Nininger*, 5 Minn. 523. Plaintiff, the indorsee of an instrument drawn on a bank, and directing it to, "ninety days after date, pay to B. or order one thousand dollars," delivered it to defendant, a bank, for collection. At the expiration of the ninety days defendant presented said instrument for payment, and protested it for non-payment, without allowing days of grace. In an action against the bank for failing to have the instrument duly presented and protested, the drawers being insolvent, *held*, that the instrument was a bill of exchange and entitled to grace, and that the bank was liable for failing to have it duly presented and protested, and notice given to the indorsers: *Georgia Nat. Bank v. Henderson*, 46 Ga. 487; 12 Am. Rep. 590. The defendant bank received from the plaintiff for collection a check drawn by him on a New Jersey bank, and mailed it to the drawee, its collecting agent in New Jersey. The custom was for the drawee to credit the defendant bank in account for all collections, and settle therefor weekly. On receiving this check, the drawee charged it to the drawer and credited the defendant with it. The next day the drawee suspended payment. *Held*, that the drawer could recover of the defendant upon the check: *Briggs v. Central National Bank of the City of New York*, 89 N. Y. 182; 42 Am. Rep. 285. Plaintiff deposited two drafts with a bank for collection, and this bank indorsed them over "for collection" to a second bank, between which two institutions there had been mutual and extensive dealings as bankers, by which the first bank owed the second a balance of two thousand dollars. The latter upon collecting these drafts applied the amount thereof to the payment of this indebtedness; it did not appear that there was any such mutual understanding or previous course of dealing as would justify the inference that these drafts were paid in to the second bank as securities on account, or were permitted to be credited on account when received, or that the proceeds were to be placed to their credit in payment of previous advances or the general balance, or that a credit was extended on the balance of account on the faith of such remittances. *Held*, that the real owner of the drafts may maintain an action to recover their amount: *Millikin v. Shapleigh*, 36 Mo. 596; 88 Am. Dec. 171.

§ 513. **Savings Banks—Nature and Powers of.**—A savings bank is an institution formed to receive deposits of

money, the income from investments, after deducting the expenses, to be divided among the depositors.¹ It is a trustee for the depositors, and subject to the jurisdiction of the courts over trusts.² They possess the usual powers and duties of banks, except that they are not banks of issue and circulation, and their capital is liable to be withdrawn upon notice.³ Whether a bank is a savings

¹ Grant on Banking, 546; West's Appeal, 64 Pa. St. 186; Bank v. Collector, 3 Wall. 495; Corte v. Society, 32 Conn. 173. In *Huntington v. Nat. Sav. Bank*, 96 U. S. 388, the supreme court of the United States held that a corporation created to receive deposits for the use and benefit of the depositors, to be invested, and the income or interest thereon to be divided among the depositors or their legal representatives, and to which the corporations contribute nothing, has no share-holders, and the profits must be paid to the depositors. "We think," said the court, "the complainants have mistaken the nature of the corporation. It is not a commercial partnership, nor is it an artificial being, the members of which have property interests in it; nor is it strictly eleemosynary. Its purpose is rather to furnish a safe depositary for the money of those members of the community disposed to intrust their property to its keeping. It is somewhat of the nature of such corporations as church wardens for the conservation of the goods of a parish, the college of surgeons for the promotion of medical science, or the society of antiquaries for the advancement of the study of antiquities. Its purpose is a public advantage without any interest in its members. The title of the act incorporating it indicates its purpose, namely, an act to incorporate a national savings bank, and the only powers given to it are those we have mentioned, powers necessary to carry out the only avowed purpose, which was to enable it to receive deposits for the use and benefit of depositors, dividing the income or interest of all deposits among its depositors or their legal representatives. It is like many other savings institutions incorporated in England and in this country during the last sixty years, intended only for

provident investment, in which the management and supervision are entirely out of the hands of the parties whose money is at stake, and which are *quasi* benevolent and most useful because they hold out no encouragement to speculative dealing or commercial trading. This was the original idea of savings banks: Scratchley's Treatise on Savings Banks, *passim*; Grant's Law of Bankers, 571, where, in defining savings banks, it is said the bank derives no benefit whatever from any deposit, or the produce thereof. Such are savings banks in England, under the statutes of 9 George IV., c. 92, sec. 2, and 26 and 27 Victoria, c. 87. Very many such exist in this country. Among the earliest are some in Massachusetts, organized under a general law passed in 1834, which contained a provision like the one in the act of Congress, that the income or profit of all deposits shall be divided among the depositors, with just deduction of reasonable expenses. They exist also in New York, Pennsylvania, Maine, Connecticut, and other states. Indeed, until recently, the primary idea of a savings bank has been that it is an institution in the hands of disinterested persons, the profits of which, after deducting the necessary expenses of conducting the business, inure wholly to the benefit of the depositors in dividends, or in a reserved surplus for their greater security. Such, very plainly, is the defendant corporation in this case." It is "engaged in the business of banking," within the tax law: *Bank v. Collector*, 3 Wall. 495. It is not a "benevolent or charitable society" within a statute: *West's Appeal*, 64 Pa. St. 186.

² In re Newark Sav. Inst., 28 N. J. Eq. 552.

³ *Eaves v. Bank*, 27 Conn. 229; 71 Am. Dec. 59.

bank depends, not on its designation, but on its functions.¹ Under a charter power to invest its capital in "bonds, notes, . . . and other evidences of debt," and "to hold any real estate necessary to carry on their business," a savings bank has power to loan money and to secure the same by a trust deed.² Where a savings bank lent money on a note signed by several persons, and afterwards took instead another note signed in part by others, it was held that whether the bank had or had not the right so to lend the money, it could recover the amount of the signers of the last note.³ A savings bank without express authority has no power to do business as a bank of discount.⁴ A savings-bank clerk, to whom authority is not given to make agreements outside the usual course of business of the bank, cannot bind the bank by an agreement that a deposit shall be withdrawn only when the depositor and two certain persons are present.⁵ A savings bank cannot apply stock belonging to the estate of one deceased, in payment of his indebtedness to the bank. The administrator is entitled to the amount for distribution among creditors generally.⁶ It cannot prohibit the withdrawal of deposits under a power in its charter to regulate such right by limiting its exercise to such reasonable time as the institution may appoint.⁷ It has no lien upon the surplus proceeds of the sale of stock held as collateral for payment of a promissory note, for the general balance due from the maker.⁸ The general creditors of a savings bank have no superior equity to the depositors to payment in case of deficiency of assets.⁹ A savings bank cannot pay as a dividend to a stockholder on its profits arising from

¹ *State v. Lincoln Savings Bank*, 14 Lea, 42.

² *Tishimingo Savings Inst. v. Buchanan*, 60 Miss. 496.

³ *Rome Savings Bank v. Krug*, 102 N. Y. 331.

⁴ *In re Jaycox*, 12 Blatchf. 209; *Pape v. Bank*, 20 Kan. 440; 27 Am. Rep. 183.

⁵ *Riley v. Albany Savings Bank*, 36 Hun, 513.

⁶ *Merchants' Bank v. Shouse*, 102 Pa. St. 488.

⁷ *Makin v. Sav. Inst.*, 23 Me. 350; 41 Am. Dec. 349.

⁸ *Brown v. New Bedford Sav. Inst.*, 137 Mass. 262.

⁹ *People v. Sav. Inst.*, 92 N. Y. 7.

its business, any portion of the interest upon its loans and investments which has matured, but is not actually collected.¹

§ 514. **Liabilities of.**—In making payments to persons who present a depositor's book, the bank is responsible only for the exercise of reasonable care and diligence;² and if the officers of the bank, using such care and diligence, make a payment upon presentation of a book by one apparently in the lawful possession of it, as owner, the true depositor is bound by the payment.³ A regulation that, on repayment of deposits, the pass-book shall be produced, is not unreasonable;⁴ subject, however, to the qualification that if the depositor makes proof of the loss or destruction of the book, he will be entitled to his money on demand.⁵ Notwithstanding such a provision in a savings-bank charter and by-law, the depositor's administrator may recover the deposit from the bank, if the book is withheld from him by the depositor's family.⁶ A clause in a deposit-book as follows: "Depositors are alone responsible for the safe-keeping of the book, and the proper withdrawal of their money. No withdrawal will be allowed without the book, and the book is the order for the withdrawal,"—must be taken to have made part of the contract between the depositor and the bank, entitling the latter to the production and offer of the book upon a demand for the deposit.⁷ Where a depositor in a savings bank agreed in writing to be bound by the by-laws of the

¹ *People v. Sav. Union*, 72 Cal. 199.

² *Hayden v. Bank*, 15 Abb. Pr., N. S., 297; *Sullivan v. Lewiston Inst. for Savings*, 56 Me. 507; 96 Am. Dec. 500.

³ *Sullivan v. Lewiston Inst. for Savings*, 56 Me. 507; 96 Am. Dec. 500; *Kelly v. Bank*, 2 Daly, 227; *Schoenwald v. Bank*, 57 N. Y. 418; *Levy v. Bank*, 117 Mass. 448; *Appleby v. Bank*, 62 N. Y. 12; *Eaves v. Bank*, 27 Conn. 229; 71 Am. Dec. 59.

⁴ *Warhus v. Bank*, 21 N. Y. 543; *Mitchell v. Bank*, 38 Hun, 255.

⁵ *Warhus v. Bank*, 21 N. Y. 543; *Heath v. Bank*, 46 N. H. 78; 68 Am. Dec. 194; *Levy v. Bank*, 117 Mass. 448; *Wallace v. Lowell Inst. for Savings*, 7 Gray, 134.

⁶ *Palmer v. Providence Savings Inst.*, 14 R. I. 68; 51 Am. Rep. 341.

⁷ *Heath v. Bank*, 46 N. H. 78; 68 Am. Dec. 194.

bank, and the deposit-book contained a copy of the by-laws, one of which gave the trustees power to alter or amend them, it was held that his right to recover money paid by the bank to a third person on a forged order was to be determined by the by-laws in force when the original contract was made, and not by a subsequent by-law of which he had no notice, whether the deposit was made before or after the passage of the late by-law; and the provision of the statute, that the deposits may be withdrawn at such time and in such manner as the by-laws direct, does not make the late by-law a part of the contract.¹ Where the by-laws of a savings bank provided that, in order to draw out money, the pass-book must be presented at the bank, and that absent depositors could withdraw their deposits on their order or check properly witnessed, it was held that the bank was liable to a depositor for money paid on forged checks, to one who had possession of the pass-book of the depositor, which were not witnessed as required by the by-laws; that whether the depositor was guilty of contributory negligence in parting with the custody of the book, was of no consequence, as it was a case of mispayment in violation of the published regulations of the bank.² A savings bank cannot refuse to return a depositor's money to him because he deposited it in the name of somebody else.³ If three persons appear together at a savings bank and make a deposit in the name of one of them, and it is agreed between them and the bank that the deposit shall be withdrawn only when all are present, and the person in whose name the deposit is made afterwards dies, this does not put an end to the agreement.⁴ Where a savings bank opened an account with "A or B, creditor," it was held that the money might be paid to either, as in the case of a joint deposit, or to the survivor, but not to

¹ *Kimins v. Bank*, 141 Mass. 33; 55 Am. Rep. 441.

² *Bank v. Cupps*, 91 Pa. St. 315.

³ *Davis v. Bank*, 53 Mich. 163.

⁴ *Riley v. Bank*, 36 Hun, 513.

the personal representative of either.¹ Possession by a stranger of the pass-book of a depositor constitutes no evidence of a right to draw, and without more, does not justify the bank in paying; nor is it otherwise where a by-law says that all payments made on presentation of the pass-book will be regarded as binding upon the depositor.² A savings bank unjustifiably refuses to pay a deposit, so that costs are properly chargeable against it, if although the name of the depositor was an assumed one, his identity is shown by possession of the pass-book and an affidavit of the fact.³ A deposit in a savings bank, made by a person in his or her name as trustee for another, is a complete and valid transfer of the title to the fund;⁴ the title to it vests immediately in the donee, and the personal representative of the donor cannot collect it from the bank.⁵ A savings bank that undertakes to invest all moneys deposited with it, and repay them upon demand, made in conformity with its by-laws, is liable to an action of *assumpsit* upon failure to do so.⁶ A depositor in an insolvent savings bank who also owes it for borrowed money cannot set off his deposit against such debt, although the deposit consisted of the borrowed money.⁷ He is not a creditor; his relation to the assets is like that of a stockholder in a bank of discount.⁸ Insufficiency of the assets of a saving institution to pay all of its depositors cannot excuse its refusal to pay any depositor who seeks to withdraw his deposit after proper notice required by the by-laws of the institution. The relation of partners does not exist between the different depositors. The right of a savings institution to divide its property among its depositors does not authorize it to refuse to pay a de-

¹ *Mulcahey v. Bank*, 62 How. Pr. 463.

² *Smith v. Bank*, 101 N. Y. 58; 54 Am. Rep. 653.

³ *Davenport v. Bank*, 36 Hun, 303.

⁴ *Martin v. Funk*, 75 N. Y. 134; 31 Am. Rep. 446.

⁵ *Boone v. Bank*, 21 Hun, 235.

⁶ *Makin v. Inst. for Savings*, 19 Me. 128; 36 Am. Dec. 740.

⁷ *Hannon v. Williams*, 34 N. J. Eq. 255; 38 Am. Rep. 378; *Osborn v. Byrne*, 43 Conn. 155; 21 Am. Rep. 641.

⁸ *Cogswell v. Bank*, 59 N. H. 43.

posit because of the insufficiency of its assets to pay all deposits. The power can only be exercised after it has been decided by vote of the trustees to make such division of the property.¹ A mere temporary suspension of payment by a savings bank will not be deemed an absolute cause of forfeiture;² but it is otherwise as to a fraudulent suspension of payment.³

ILLUSTRATIONS. — The charter of a savings bank provided that, for the security of depositors, a certain capital should be raised previous to incorporation, "which capital shall at all times be liable to the depositors for the amount of their deposits." The bank made an assignment for the benefit of creditors. *Held*, that the capital aforesaid could not be claimed exclusively by depositors: *Fox's Appeal*, 93 Pa. St. 406. A had four hundred dollars on deposit in a savings bank. She lent B two hundred dollars, and by forging her name he drew out the remaining two hundred dollars. Then he deposited \$150 to her credit. *Held*, that the bank owed her \$350: *Underhill v. Poughkeepsie Savings Bank*, 32 Hun, 432. A and B deposited money in a savings bank, the credit being given to "A or B," at their request. They afterwards deposited frequently in the same way, stating to the bank officers that either or both could draw the money. B died. A notified the bank that B's widow and administratrix had the book, and directed the bank not to pay to her. The bank did pay to her the deposit, however, on her producing the book and her letters. *Held*, that A could maintain an action for her actual share of the deposits: *Mulcahey v. Emigrant Industrial Savings Bank*, 89 N. Y. 435. A by-law of a savings bank provided that the record, which it was the duty of the secretary and treasurer to keep, should "be held in proof of the votes and transactions of the corporation." The treasurer was authorized by vote to discharge and release mortgages, and he fraudulently altered the record so that it purported to give him authority to assign them also. *Held*, that the bank was liable for his act in assigning a mortgage, the assignee taking for value in good faith and in reliance on the record: *Commonwealth v. Reading Savings Bank*, 137 Mass. 431. A first learned, after his wife's death, that she had deposited his money in a savings bank in her own name. He learned the fact from the cashier of the bank, who informed him of it upon his ordering the cashier not to pay out any of his money, as he could not find the bank-book. The cashier advised him to procure the

¹ *Makin v. Sav. Inst.*, 23 Me. 350;
41 Am. Dec. 349.

² *State v. Sav. Co.*, 12 La. Ann. 568.

³ *State v. Sav. Co.*, 12 La. Ann. 568.

appointment of some one as administrator, which A did, and the person so appointed demanded and received, as administrator, the amount. *Held*, that A had no claim against the bank: *McDermott v. Miners' Savings Bank*, 100 Pa. St. 285. B was treasurer of a savings institution, and also cashier of a bank. Both corporations did business in the same office over the same counter, the savings institution receiving no money, but instead, credits for deposits. C appeared at the counter with money to deposit in the savings institution. B received it, but did not credit it on the books. D, desiring to pay a sum of money to the savings institution, gave his check to B, payable to B as treasurer. B indorsed the check as treasurer and as cashier, and remitted it for collection, but gave the savings institution no credit for the amount. *Held*, in an action brought by the savings institution against the bank, that both the amount of the deposit and the amount of the check were recoverable: *Fish-kill Savings Institute v. Bostwick*, 92 N. Y. 564. The charter of a savings bank authorized it to accept and execute any trusts committed to such bank, by any person, by will or otherwise, or by order of any court. Under a family agreement, \$25,000 were deposited in the bank to pay \$1,460 per annum to the widow for life, and the surplus of the income from such deposit, if any, to her children. The bank was subsequently taken under the control of this court, on a deficiency of assets to pay its depositors in full. *Held*, 1. That it was not established by proof that such deposit was taken by the bank as a special trust, or as a deposit differing materially from the other ordinary deposits of the bank; 2. That such deposit is not entitled to preference in payment over others; 3. That even if the trust claimed had been shown, nothing in the charter gives the fund the priority claimed, and it would not be entitled to it: *Vail v. Newark Savings Inst.*, 32 N. J. Eq. 627. A, a depositor in a savings bank, assigned his book to B, who notified the bank. The bank afterwards was summoned by C, as A's trustee, and was defaulted. C received, under his execution, a deposit-book from the treasurer of the bank, and indorsed the amount on the execution. *Held*, that C did not become a creditor of the bank: *Commonwealth v. Bank*, 137 Mass. 301. A savings bank met with a loss which was, by vote of the directors, apportioned *pro rata* among the depositors. In an action by a depositor to recover the full amount of his deposit, *held*, that the bank was merely the agent of depositors, and that plaintiff could not recover: *Bunnell v. Collinsville Savings Society*, 38 Conn. 203; 9 Am. Rep. 380.

§ 515. National Banks—Creation and Formation of.—Congress, under its power to establish a national currency,

has power to create national banking associations.¹ And the states can exercise no control over them except with its consent.² National banks are private corporations organized for private gain, and managed by officers of their own selection. They constitute no part of the government. The comptroller of the currency has supervisory powers over them; but this does not involve the government in any liability for their acts.³ A national banking association may be formed by any number of persons not less than five.⁴ They must enter into articles of association to be signed by them, and filed in the office of the comptroller of the currency;⁵ and the certificate of the comptroller is conclusive as to the validity of the organization of such corporation.⁶ The certificate of the comptroller of the currency is conclusive as to the regularity of the proceedings by which a savings bank has been converted into a national bank.⁷ A national banking association is to be regarded as "located" at the place specified in its organization certificate. If such place is a place in a state, the association is located in that state.⁸ It is not liable in its corporate capacity for the undertaking of an individual touching its organization, unless the bank, after its organization, adopt in some manner the contract.⁹

¹ *Veazie Bank v. Fenno*, 8 Wall. 553. The power to create a corporation, as an appropriate instrument for the execution of a constitutional power vested in the federal government, only carries with it authority to confer upon that corporation such privileges or immunities from state laws as are necessary to enable it to effect the legitimate national objects for which it is created: *First National Bank v. Lamb*, 50 N. Y. 95; 10 Am. Rep. 438.

² *Farmers' National Bank v. Dearing*, 91 U. S. 29; *Stetson v. Bangor*, 56 Me. 274. A statute making it a misdemeanor for the cashier of any bank to engage in any other occupation has no application to the cashiers of national banks: *Allen v. Carter*, 119 Pa. St. 192.

But an insolvent law, making voidable preferential mortgages given within four months of the institution of insolvency proceedings against the mortgagor, applies as well when the mortgage is a national bank as in the case of any other mortgagee: *Witters v. Sowles*, 32 Fed. Rep. 758.

³ *Branch v. United States*, 12 Ct. of Cl. 281.

⁴ U. S. Rev. Stats., secs. 5133 et seq.

⁵ U. S. Rev. Stats., secs. 5133 et seq.

⁶ *Casey v. Galli*, 94 U. S. 673; *Mix v. Bank*, 91 Ill. 20; 33 Am. Rep. 44.

⁷ *Keyser v. Hitz*, 2 Mackey, 473.

⁸ *Manufacturers' National Bank v. Baack*, 8 Blatchf. 137.

⁹ *McDonough v. First Nat. Bank*, 34 Tex. 309.

§ 516. **Powers of.**—A national bank as a body corporate has power to adopt and use a corporate seal; to have succession for the period of twenty years, unless sooner dissolved; to make contracts; to sue and be sued; to elect or appoint directors, and by its board of directors to appoint a president and other officers; to prescribe by-laws; and to exercise all such incidental powers as shall be necessary to carry on the business of banking.¹ It has power to buy the check of an individual drawn on another bank, whether payable to bearer or order;² to purchase, at a discount, notes and bills of third persons which are perfect and available in the hands of the borrower, as well as the borrower's own paper;³ to loan money;⁴ engage in the business of dealing in and exchanging government securities;⁵ buy a draft accompanying a bill of lading, the draft being drawn in favor of the bank by a seller of goods upon a buyer;⁶ give a guaranty;⁷ agree to procure a release of a mortgage held

¹ U. S. Rev. Stats., sec. 5136.

² *First Nat. Bank v. Harris*, 108 Mass. 514.

³ *Smith v. Exchange Bank*, 26 Ohio St. 141.

⁴ And the fact that it loans beyond the amount authorized by statute does not defeat its right to collect it: *Mills Co. Bank v. Perry*, 72 Iowa, 15; 2 Am. St. Rep. 228.

⁵ *Van Leuven v. First National Bank of Kingston*, 54 N. Y. 671.

⁶ *Union Bank v. Rowan*, 23 S. C. 339; 55 Am. Rep. 26.

⁷ In *People's Bank v. Manufacturers' Bank*, 101 U. S. 181, the vice-president of a national bank, upon making a transfer for value of certain notes belonging to the bank [the bank being the correspondent of the transferee], executed this guaranty: "In accordance with your telegram, I herewith hand you ten notes of five thousand dollars each." "We debit your account fifty thousand dollars." "This bank hereby guarantees the payment of the principal sum and interest of said notes." This was done in behalf of the bank, and the notes were also

indorsed by the same individual as vice-president of the bank. It was done with the knowledge and consent of the president and cashier of the bank, but without authority of the directors, as a board, or the majority of its members individually. The court held that the bank was liable on the guaranty, saying: "The national banking act (Rev. Stats. U. S. 999, sec. 5136) gives to every bank created under it the right 'to exercise by its board of directors, or duly authorized agents, all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt, by receiving deposits,' etc. Nothing in the act explains or qualifies the terms italicized. To hand over with an indorsement and guaranty is one of the commonest modes of transferring the securities named. Undoubtedly, a bank might indorse, 'waiving demand and notice,' and would be bound accordingly. A guaranty is a less onerous and stringent contract than that created by

by a third person;¹ purchase, hold, and convey real estate for the purposes mentioned in the statute;² purchase land at foreclosure sale on which it has loaned money, and cut and sell the timber on it;³ sell its realty and take a mortgage for the price;⁴ sell real estate and take personal property in payment;⁵ take stocks and bonds as collateral security for a loan, or in payment or compromise of a doubtful debt;⁶ take real estate as security for a previous loan;⁷ receive a conveyance of real estate in satisfaction of a previous indebtedness.⁸ If it lawfully holds a second mortgage, it may buy in the first one to protect its interest.⁹ A national bank, organized as the successor of a state bank, may hold the assets of its predecessor even though in form it was organized as a new bank,¹⁰ and it may maintain an action on a continuing guaranty for loans held by it before the change, for loans both before and after the change.¹¹ The directors of a national bank have power to remove the president, both under the act of Congress relative to national banks, and under the articles of association, where such articles give express

such an indorsement. We see no reason to doubt that, under the circumstances of this case, it was competent for the bank to give the guaranty in question. It is to be presumed the vice-president had rightfully the power he assumed to exercise, and the bank is estopped to deny it." But it is held in New Hampshire that it cannot guarantee a contract between third persons: *Norton v. Derby Nat. Bank*, 61 N. H. 589; 60 Am. Rep. 335.

¹ *McCraith v. Mohawk Valley Bank*, 104 N. Y. 414.

² U. S. Rev. Stats., sec. 5137.

³ *Ruebling v. Richmond Bank*, 30 Fed. Rep. 744.

⁴ *New Orleans Nat. Bank v. Raymond*, 29 La. Ann. 355; 29 Am. Rep. 335.

⁵ *First Nat. Bank of Ottumwa v. Reno*, 73 Iowa, 145.

⁶ *First Nat. Bank v. Nat. Ex. Bank*, 92 U. S. 122; *Canfield v. Bank, Thomp. Nat. Bank Cas.* 173; *Third Nat. Bank v. Boyd*, 44 Md. 47; 22 Am. Rep. 35.

A national bank does not transcend its powers in taking from a customer, as collateral security for a loan to him, the note and mortgage of a third party, together with certain personal securities; and if the borrower becomes insolvent and the personal securities prove insufficient, the bank can maintain a bill to foreclose the mortgage: *Merchants' Bank v. Mears*, 8 Biss. 158.

⁷ *Woods v. People's Nat. Bank*, 83 Pa. St. 57; *Ornn v. Nat. Bank*, 16 Kan. 341; *Merchants' Nat. Bank v. Mears*, *Thomp. Nat. Bank Cas.* 353; or a chattel mortgage: *Spafford v. Bank*, 37 Iowa, 181; 18 Am. Rep. 6; *Gaar v. Centralia Bank*, 20 Ill. App. 611.

⁸ *Turner v. Bank*, 78 Ind. 19.

⁹ *Holmes v. Boyd*, 90 Ind. 332.

¹⁰ *Western Reserve Bank v. McIntire*, 40 Ohio St. 528.

¹¹ *City Nat. Bank v. Phelps*, 97 N. Y. 44; 49 Am. Rep. 513.

authority to remove; and it makes no difference that the bank has never adopted any by-laws.¹ A national bank has corporate power to enter into an agreement with a customer, to exchange for him non-registered United States bonds for registered bonds; and it is bound by an agreement to that effect, made for a sufficient consideration by its cashier.² But a national bank has no power to deal in stocks;³ or deal in promissory notes except by way of discount;⁴ or buy notes for speculation;⁵ or sell railroad bonds on commission;⁶ or buy bonds or stocks as agent for third persons;⁷ or take special deposits merely for the accommodation of the depositor;⁸ or to lend its credit on personal security;⁹ or to guarantee the obligation of one making with it a deposit of collateral security;¹⁰ nor to take real property on a mortgage or deed of trust to secure a concurrent debt or future advances.¹¹ *Ultra vires* cannot be pleaded to an action by a national bank

¹ Taylor v. Hutton, 43 Barb. 195; 18 Abb. Pr. 16.

² Yerkes v. Bank, 69 N. Y. 383; 25 Am. Rep. 208.

³ First Nat. Bank v. First Nat. Ex. Bank, 92 U. S. 122.

⁴ First Nat. Bank v. Pierson, 24 Minn. 140; 31 Am. Rep. 341.

⁵ First Nat. Bank v. Pierson, 24 Minn. 140; 31 Am. Rep. 341; except from surplus capital: Lazear v. Nat. Bank, 52 Md. 78; 36 Am. Rep. 355. In an action upon a negotiable promissory note, brought by a national bank, which had purchased the same against an indorser thereof, the defendant cannot raise the defense that the plaintiff, being a national bank under the laws of the United States relating to banks and banking associations, had no power or authority to purchase the note in suit, and therefore had no title to the note: Nat. Pemb. Bank v. Porter, 125 Mass. 333; 28 Am. Rep. 235.

⁶ Weckler v. Bank, 42 Md. 581; 20 Am. Rep. 95.

⁷ First Nat. Bank v. Hoch, 89 Pa. St. 324; 33 Am. Rep. 769.

⁸ Wiley v. Bank, 47 Vt. 546; 19 Am.

Rep. 122; First Nat. Bank v. Ocean Bank, 60 N. Y. 278; 19 Am. Rep. 181; Whitney v. First Nat. Bank, 50 Vt. 388; 28 Am. Rep. 503.

⁹ Seligman v. Charlottesville Bank, 3 3 Hughes, 647; Johnston v. Charlottesville Bank, 3 Hughes, 657.

¹⁰ Seligman v. Charlottesville Bank, Hughes, 647.

¹¹ Fowler v. Scully, 72 Pa. St. 456; 13 Am. Rep. 699; Matthews v. Skinker, 62 Mo. 329; 21 Am. Rep. 425; Allen v. Bank, 23 Ohio St. 97; Kansas Valley Nat. Bank v. Rowell, 2 Dill. 371; Crocker v. Whitney, 71 N. Y. 161. But it is held that a mortgage so taken is not void, but may be enforced, the penalty for violation of the statute being enforceable only by the government by a revocation of the bank's charter: Union Nat. Bank v. Matthews, 98 U. S. 621; reversing Matthews v. Skinker, 62 Mo. 329; 21 Am. Rep. 425; National Bank v. Whitney, 103 U. S. 99; First Nat. Bank v. Elmore, 52 Iowa, 541; Wroten v. Armat, 31 Gratt. 223; Thornton v. Nat. Exchange Bank, 71 Mo. 221; Reynolds v. Crawfordsville Bank, 112 U. S. 405; Fortier v. N. E. Bank, 112 U. S. 439.

on a negotiable note purchased by it.¹ One who has borrowed money from a trust and banking corporation, upon securities on which it was prohibited from lending, cannot avail himself of the prohibition as a defense to the action for money lent. The breach of the law committed in making the loan may expose the corporation to penalty at the suit of the state; but is no answer to its claim to be repaid.² To a suit brought by a national bank on a renewal note, it is no defense that the original loan was for a larger sum than the bank was, by its charter, authorized to make; the debt upon the renewal being reduced within the limited maximum.³ Want of power of a bank, or of its trustee in insolvency, to purchase and hold real estate, does not render void an arrangement whereby land subject to a lien in favor of the bank, and also to other encumbrances, is discharged of those encumbrances, by aid of money advanced from the assets of the bank, and then sold, and the whole proceeds realized for the bank; provided the legal title is not passed through the bank or trustees.⁴

ILLUSTRATIONS. — The defendant owed a large sum of money to a national bank; to partially secure the payment thereof, he gave a mortgage to the bank on some property owned by him in Chicago, Illinois. There was a prior lien of two thousand dollars on the Chicago property, which the defendant agreed to pay. Five hundred dollars of the same became due, and the bank, in order to save and protect its own lien on said Chicago property, and at the request of the defendant, paid said sum of five hundred dollars, and then took the note and mortgage now sued on for that amount on property situated in Crawford County, Kansas. *Held*, that the taking of the last-mentioned mortgage was not a violation of the national banking law, and that the mortgage was valid: *Ornn v. Bank*, 16 Kan. 341. A national bank refused to negotiate a loan upon the responsibility of a firm, but made it upon a note made by one member of the firm to the other, and indorsed by the latter, the maker

¹ *Merchants' Nat. Bank v. Hanson*, 33 Minn. 40; 53 Am. Rep. 5.

² *Allen v. Freedman's Savings and Trust Co.*, 14 Fla. 418.

³ *Allen v. First National Bank of Xenia*, 23 Ohio St. 97.

⁴ *Zantzingers v. Gunton*, 19 Wall. 32.

giving a bond and mortgage upon separate property to secure the indorser against liability, upon his indorsement, with an agreement that in case of default the security should inure to the bank. *Held*, not within the prohibition of section 28 of the national banking act, against such banks holding real estate by purchase or mortgage: *First National Bank v. Haire*, 36 Iowa, 443. A national bank, under an agreement with B to receive from him a commission of five per cent for so doing, indorsed and procured to be discounted by another national bank a note made by B. to W., who was an accommodation indorser. The note was protested for non-payment, and taken up by the former bank. In its action against W. on the note, *held*, that the transaction was not, as a matter of fact, usurious, nor *ultra vires*; that the plaintiff bank got its title through the discounting bank, a *bona fide* holder for value, and became the lawful owner of the note, and entitled to enforce it: *Gloversville Nat. Bank v. Wells*, 15 Hun, 51. S., a commission merchant in St. Louis, to secure a debt of six thousand five hundred dollars due a national bank in Illinois, transferred to the bank a note of twenty thousand dollars, of M., secured by a deed of trust on real estate subject to further liens. M. executed to the bank a deed of the property in payment of the sum due from him, the bank agreeing to discharge the other liens thereon. *Held*, that such transaction was allowed by the national banking law, permitting such banks to "purchase, hold, and convey" real estate for certain purposes, and no other: *Mapes v. Scott*, 38 Ill. 352.

§ 517. **Liabilities of.**—Though a national bank has no authority to take special deposits, it is liable if it does so for gross negligence in keeping them.¹ If the owner of merchandise intrusts it to the bank for shipment and sale, the bank is liable to him for the proceeds, although it is not within the general powers of national banks to sell produce on commission.² So if a national bank engages to hold a deposit as collateral security for the faithful performance of a contract by the depositor with a third person, such third person may recover against the bank

¹ *Chattahoochee Nat. Bank v. Alb. L. J.* 506; *First Nat. Bank v. Schley*, 58 Ga. 369; *De Haven v. Graham*, 100 U. S. 699; affirming 79 *Kensington Nat. Bank*, 81 Pa. St. 95; *Pa. St.* 106; 21 *Am. Rep.* 49.
² *First Nat. Bank v. Priest*, 50 Ill. 605; 97 *Am. Dec.* 59; *Pattison v. 321*; and see *German Nat. Bank v. Syracuse Nat. Bank*, 17 Hun, 419; *Meadowcroft*, 95 Ill. 124; 35 *Am. Rep.* *Pattison v. Syracuse Nat. Bank*, 22 137.

for the depositor's non-performance.¹ When a state bank reorganizes as a national bank, under the national banking law, it does not relieve itself from any former liabilities by the change.² And where a state bank was robbed, and the cashier offered a reward for the detection of the thieves, and the bank afterward became a national bank, suit against it for the reward was sustained.³ National banks, like any other corporations, and the receivers of the same, may sue and be sued in the state courts of their domicile.⁴ Actions, local in their nature, may be maintained in the proper state court against a national banking association in a county or a city other than that where it is established.⁵ The federal statutes prohibit the issuance of writs of attachment by the state courts before final judgment against national banking associations or their property. An attachment and seizure of property made by virtue of a writ so issued and served is illegal and void, and no jurisdiction over the person or property of such an association is obtained thereby.⁶

ILLUSTRATIONS.—A national bank held as depository United States bonds belonging to plaintiff; in the spring of 1869 its cashier, for a sufficient consideration, agreed with the plaintiff to exchange them for registered bonds; the bank neglected to make the exchange, and in the fall of that year the bonds were stolen. *Held*, that the bank was liable for their value: *Yerkes v. National Bank of Port Jervis*, 69 N. Y. 382; 25 Am. Rep. 208. A national bank received from a customer bonds as collateral security for a debt then existing, and for future obligations. Afterward, and after the customer had paid his indebtedness, the bonds were stolen from the bank. *Held*, 1. That the bank was not a gratuitous bailee of such bonds; 2. That it had power to take the bonds as security for existing or future loans; 3. That

¹ *Bushnell v. Chautauqua Co. Nat. Bank*, 10 Hun, 378; and see *Yerkes v. Nat. Bank*, 69 N. Y. 383; 25 Am. Rep. 208. But compare *First Nat. Bank v. Citizens' Bank*, 21 Int. Rev. Rec. 382.

² *Coffey v. National Bank*, 46 Mo. 140; 2 Am. Rep. 488; *Thorp v. Wegfarth*, 56 Pa. St. 82; 93 Am. Dec.

789; and see *Maynard v. Bank*, 7 Phila. 6.

³ *Kelsey v. Nat. Bank of Crawford*, 69 Pa. St. 426; *Thomp. Nat. Bank Cas.* 847.

⁴ *Adams v. Daunis*, 29 La. Ann. 315.

⁵ *Casey v. Adams*, 102 U. S. 66.

⁶ *First Nat. Bank v. Ladue*, Minn. 1888.

it was liable if it failed to exercise ordinary care and diligence in keeping the bonds; and 4. That the measure of damage was the value of the bonds when stolen, and not when demand of them was made: *Third Nat. Bank v. Boyd*, 44 Md. 47; 22 Am. Rep. 35; *Leach v. Hale*, 31 Iowa, 69; 7 Am. Rep. 112.

§ 518. **Interest on Loans.**—National banks may charge the rate of interest fixed by state laws for lenders generally,¹ and may take a higher rate, if state banks of issue are permitted by the laws of the state to reserve more.² If no rate of interest is defined by the laws of the state wherein the national bank is located, seven per cent is allowed to be charged.³ And this rule applies to loans made by national banks to corporations where the statute laws of the state expressly forbid a corporation to interpose the defense of usury.⁴ Where, by the statute law of a state, parties are allowed to contract for a usurious rate of interest, evidenced by a memorandum in writing, signed by the party to be charged, a national bank located in the state may discount notes, charging usurious interest in advance, without other memorandum than the notes.⁵ But a national bank is not justified in taking the rate of interest allowed by special statutes of a state, to a few banks of issue, where such rate is higher than that allowed to banks of issue generally.⁶ The only penalty incurred by national banks for taking excessive interest is that imposed by the national banking act;⁷ namely, the

¹ *Tiffany v. Nat. Bank of Mo.*, 18 Wall. 409; *Shunk v. First Nat. Bank*, 22 Ohio St. 508.

² *Tiffany v. Nat. Bank of Mo.*, 18 Wall. 409; *Johnson v. Nat. Bank of Gloversville*, 74 N. Y. 329; 30 Am. Rep. 302.

³ U. S. Rev. Stats., sec. 5197.

⁴ *In re Wild*, 11 Blatchf. 243; *Rosa v. Butterfield*, 33 N. Y. 665; *First Nat. Bank v. Lamb*, 50 N. Y. 95; 10 Am. Rep. 438. National banks organized under act of Congress are not bound by the usury laws of the state in which they are situated: *First Nat. Bank v. Garlinghouse*, 22 Ohio St. 492;

10 Am. Rep. 751; *Central Nat. Bank v. Pratt*, 115 Mass. 589; 15 Am. Rep. 138; *Davis v. Randall*, 115 Mass. 547; 15 Am. Rep. 146; *Higley v. First Nat. Bank*, 26 Ohio St. 75; 20 Am. Rep. 759; *Farmers' and Mechanics' Nat. Bank v. Dearing*, 91 U. S. 29.

⁵ *Newell v. Nat. Bank of Somerset*, 12 Bush, 57; *Wiley v. Starbuck*, 44 Ind. 298.

⁶ *Duncan v. First Nat. Bank*, *Thomp. Nat. Bank Cas.* 360; 11 *Bank Mag.* 787.

⁷ U. S. Rev. Stats., sec. 5198; *Farmers' etc. Bank v. Dearing*, 91 U. S. 29; *Wiley v. Starbuck*, 44 Ind. 298.

forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon,¹ and liability to action to recover back double the amount of interest paid.² The penalty is not limited to cases where the instrument upon its face carries interest with it;³ but the moment usurious interest is "taken, received, or charged," the forfeiture is established.⁴ And any party to the transaction may avail himself of it, if payment is sought to be enforced against him.⁵ The usurious interest only is doubled, and not the entire interest.⁶ The remedy by "forfeiture of the entire interest," for exacting unlawful interest, can only be had by way of defense to an action on the note, or to recover the loan, and no action lies for it.⁷ And where illegal interest has been paid, it cannot be set up by way of counterclaim or set-off, that the bank knowingly took a greater rate of interest than that allowed by law, and the proper remedy in such case is an action of debt to recover back twice the amount.⁸ A state court has jurisdiction of an action against a national bank to recover the penalty for exacting unlawful interest.⁹ But the courts of one state have no jurisdiction of such an

¹ U. S. Rev. Stats., sec. 5198; *Nat. Bank v. Lewis*, 81 N. Y. 15.

² U. S. Rev. Stats., sec. 5198; *Nat. Ex. Bank v. Moore*, 2 Bond, 170. No loss of the entire debt is incurred by the bank, as a penalty or otherwise, by reason of the provisions of the usury law of a state: *Farmers' etc. Nat. Bank v. Dearing*, 91 U. S. 29; and see *First Nat. Bank v. Garlinghouse*, 22 Ohio St. 492; 10 Am. Rep. 751; *Wiley v. Starbuck*, 44 Ind. 298; *Merchants' etc. Nat. Bank v. Myers*, 74 N. C. 514; *Cheek v. Merchants' Nat. Bank*, 10 Heisk. 618; *Davis v. Randall*, 115 Mass. 547; 15 Am. Rep. 146; *Hintermister v. First Nat. Bank*, 64 N. Y. 212; *overruling First Nat. Bank v. Lamb*, 50 N. Y. 95; 10 Am. Rep. 438.

³ *National Bank v. Lewis*, 75 N. Y. 516; 31 Am. Rep. 484.

⁴ *National Bank v. Lewis*, 75 N. Y. 516; 31 Am. Rep. 484.

⁵ *Smith v. Exchange Bank of Pittsburgh*, 26 Ohio St. 141; *Bank of Cadiz v. Slemmons*, 34 Ohio St. 142; 32 Am. Rep. 364; *Hintermister v. First Nat. Bank*, 64 N. Y. 212; *Nat. Bank v. Lewis*, 75 N. Y. 516; 31 Am. Rep. 484.

⁶ *Hintermister v. Bank*, 64 N. Y. 212; *Brown v. Second Nat. Bank*, 72 Pa. St. 209.

⁷ *Brown v. Second Nat. Bank*, 72 Pa. St. 209.

⁸ *Hintermister v. Bank*, 64 N. Y. 212; *Nat. Bank v. Lewis*, 81 N. Y. 15.

⁹ *Bletz v. Columbia Nat. Bank*, 87 Pa. St. 87; 30 Am. Rep. 343; *Ordway v. Bank*, 47 Md. 217; 28 Am. Rep. 455; *Dow v. Bank*, 50 Vt. 112; 28 Am. Rep. 493.

action against a national bank located in another state.¹ A bill in equity will not lie to recover usury from a national bank.²

§ 519. Dissolution and Winding up.—The dissolution and winding up of national banks is governed by the provisions of the national banking act;³ yet where a case arises not provided for there, the bank may be proceeded against like any other corporation.⁴ The provisions of the statute are not exclusive, and do not oust the courts of their power to appoint a receiver upon a judgment creditor's bill.⁵ The corporate existence of the bank is not dissolved by the appointment of a receiver;⁶ and after his appointment, and while he is administering the

¹ *Mo. R. Tel. Co. v. Bank*, 74 Ill. 217.

² *Hambricht v. National Bank*, 3 Lea, 40; 31 Am. Rep. 629; *Barnet v. Nat. Bank*, 98 U. S. 555.

³ In re *Mfrs. Nat. Bank*, 5 Biss. 499; *Union Gold Mining Co. v. Bank*, 1 Col. 531. Title 62 of the Revised Statutes, relating to the organization of banks, provides for the appointment of a receiver by the controller of the currency to wind up their affairs only in the following cases: 1. For not keeping good a surplus: sec. 5151; 2. For not keeping stock at minimum: sec. 5141; 3. For not keeping good its reserve: sec. 5191; 4. For not selecting a place for the redemption of its notes: sec. 5195; 5. For holding its own stock over six months: sec. 5201; 6. For non-payment of its circulating notes: sec. 5234; 7. For improperly certifying a check: sec. 5208; 8. For failing to pay up capital stock, and to allow the same to become, and to remain, impaired by losses: sec. 5205.

⁴ *Irons v. Mfrs. Nat. Bank*, 6 Biss. 301.

⁵ *Wright v. Merchants' Nat. Bank*, 3 Cent. L. J. 351. A receiver appointed by the comptroller of the currency is held to be an officer of the United States: *Platt v. Beach*, 2 Ben. 303; but he does not represent the government in such a way that, by suing the receiver and comptroller, a judgment may be obtained against it:

Case v. Terrell, 11 Wall. 199. The receiver properly represents the bank, its stockholders, and its creditors: *Case v. Terrell*, 11 Wall. 199. He holds the same title to the assets of the bank that the bank held: *Casey v. La Société etc.*, 2 Woods, 77; *Thomp. Nat. Bank Cas.* 285. He may sue for debts due the bank, either in his own name as receiver, or in the name of the bank: *Casey v. Galli*, 94 U. S. 73; *Bank v. Kennedy*, 17 Wall. 19; and he may sue for an ordinary debt without being instructed so to do by the comptroller: *Bank v. Kennedy*, 17 Wall. 19. But the receiver, directed to sell the assets on such terms and in such manner as he deems best for the interest of all concerned, has no power to exchange, barter, or trade the assets: *Ellis v. Little*, 27 Kan. 707; 41 Am. Rep. 434. And the debtors, when sued, cannot inquire into the legality of the appointment of the plaintiff as receiver: *Cadle v. Baker*, 20 Wall. 650; *Platt v. Beebe*, 57 N. Y. 339; *Platt v. Crawford*, 8 Abb. Pr., N. S., 297. But when it is sought to enforce the personal liability of the stockholders, suit for that purpose can be instituted by the receiver only, by direction of the comptroller: *Kennedy v. Gibson*, 8 Wall. 498.

⁶ *Bank of Bethel v. Bank*, 14 Wall. 383; *Green v. Walkill Nat. Bank*, 7 Hun, 63.

affairs of the bank, a suit may be instituted against it in its corporate name.¹ So an action may be prosecuted against a national banking association, although it has suspended active operations, and has voluntarily resolved to go into a state of liquidation.² The claims of depositors are, when proved to the satisfaction of the comptroller of the currency, placed upon the same footing as if they were reduced to judgments.³ A national bank, the successor of one which went into liquidation, is liable for deposits therein.⁴ But to render the successors of a bank liable for its delinquencies, something more must be shown than the mere fact that they succeeded it in business; and the party seeking to recover therefor must prove that they received some portion of its funds or property.⁵

ILLUSTRATIONS.—A national bank had failed to redeem its notes, and the comptroller of the currency had appointed a receiver who was in possession. A creditor presented a claim which was disallowed, and the creditor brought suit upon it against the bank. *Held*, that the proceedings of the comptroller had not produced a forfeiture of the franchise of the bank and a dissolution of the corporation, and that therefore the suit would lie against it: *National Pahquioque Bank v. First Nat. Bank*, 36 Conn. 325. The receiver of an insolvent national bank sued A and B on their joint note given to the bank. They claimed to set off notes given by the bank, and C and D, who were also insolvent, as joint makers, to D alone, and maturing after the receiver's appointment, and growing out of a distinct transaction from the note in suit. *Held*, not a proper set-off: *Balch v. Wilson*, 25 Minn. 299; 33 Am. Rep. 467.

§ 520. Directors of Banks—Powers of.—The board of directors of a bank represent the corporation in all dealings, and have the general management of its affairs.⁶ They have power to delegate to the president and cashier power to borrow money and obtain discounts for the use of

¹ *Chemical Nat. Bank v. Bailey*, 12 U. S. 437. *Blatchf.* 480; *Security Bank v. National Bank*, 4 Thomp. & C. 518.

² *Ordway v. National Bank*, 47 Md. 217; 28 Am. Rep. 455.

³ *National Bank of Commonwealth*

v. Mechanics' Nat. Bank, 94 U. S. 437.

⁴ *Eans v. Exch. Bank*, 79 Mo. 182.

⁵ *Hopper v. Moore*, 42 Iowa, 563.

⁶ *Burrill v. Bank*, 2 Met. 163; 35

Am. Dec. 395.

the bank;¹ delegate to a committee authority to mortgage the real estate of the bank;² make an assignment of the bank's property (it being insolvent) for creditors.³ But to bind the bank the directors must act as a board; their individual assent is ineffectual.⁴ So national bank directors can act only as a board. The assent of a majority of them acting singly and separately does not bind the bank.⁵ Acceptance of a deed in settlement of a defalcation from a bank cannot be by any individual director, but must be by the board.⁶ The president and cashier of a bank, and a "finance committee" of the board of directors, as such merely, have no power to execute a mortgage of the lands of the corporation without the concurrence of the board of directors.⁷

But the directors of a bank have no power to delegate to others the power to make discounts,⁸ make gifts from the property of the bank, or use the funds for purposes foreign to the objects of the bank,⁹ or to waive the service of a petition praying a forfeiture of its charter, or to waive the delay within which third persons may intervene to protect their interest, or of filing an answer which virtually confesses the forfeiture of the charter and admits the necessity of the immediate liquidation of the bank.¹⁰

Notice to the board of directors of a bank is notice to the bank.¹¹ And notice to one or more of the direc-

¹ *Ridgway v. Farmers' Bank*, 12 Serg. & R. 256; 14 Am. Dec. 681.

² *Burrill v. Bank*, 2 Met. 163; 35 Am. Dec. 395. The directors have authority to control all the property of the bank, and they may authorize one of their number to assign any securities belonging to the corporation: *Northampton Bank v. Pepon*, 11 Mass. 288.

³ *Descombes v. Wood*, 91 Mo. 196; 60 Am. Rep. 239.

⁴ *First Nat. Bank v. Drake*, 35 Kan. 564; 57 Am. Rep. 193.

⁵ *First Nat. Bank v. Drake*, 35 Kan. 564; 57 Am. Rep. 193.

⁶ *Bank of Healdsburg v. Bailhache*, 65 Cal. 327.

⁷ *Leggett v. Bank*, 1 N. J. Eq. 541; 23 Am. Dec. 728.

⁸ *Bank Commissioners v. Bank*, 6 Paige, 497; *Bank v. Dunn*, 6 Pet. 51.

⁹ *Frankfort Bank v. Johnson*, 24 Me. 490.

¹⁰ *State v. Citizens' Savings Bank*, 31 La. Ann. 836.

¹¹ *Farmers' etc. Bank v. Payne*, 25 Conn. 444; 68 Am. Dec. 362; *Mechanics' Bank v. Seton*, 1 Pet. 299; *Fulton Bank v. N. Y. etc. Canal Co.*, 4 Paige, 127; *Toll Bridge Co. v. Betsworth*, 30 Conn. 380.

tors, when engaged in the business of the bank, will be deemed notice to the bank.¹ But not when not so engaged.² Information given to the directors of a bank at a regular meeting, by one of their number, of the dissolution of a firm whose paper is subsequently offered for discount, is notice to the bank, notwithstanding the absence at such meeting of the committee whose business it was to act on such matters.³ The fact that the payee of a note happens to be a director of the bank that discounts the note, for his benefit, without notice of the maker's claim for recoupment, will not bar the recovery by the bank, as an innocent holder for value without notice.⁴ A bank discounting negotiable paper upon the recommendation of a director is not charged with notice of facts within his knowledge, simply because he is a director, unless he controls its discretion, or acts as the agent of the bank.⁵ Under a statute fixing the compensation of directors of the state bank, a director of a branch bank, receiving the compensation provided by law, can be allowed no compensation by the board for extra services while he continues a director.⁶ But the board may compensate one of their number for services rendered to the bank before he became a director.⁷

ILLUSTRATIONS. — Several persons, two of whom were directors in a bank, jointly purchased all the property of the bank, including certain debts, which appeared at their full amount on the list of debts due the bank, but which these two directors knew had been then compromised. *Held*, that their knowledge was in law the knowledge of all the purchasers, and that such compromise could not be set up in defense of an action for the

¹ Bank of Pittsburg v. Whitehead, 10 Watts, 397; 36 Am. Dec. 186; Washington Bank v. Lewis, 22 Pick. 24; Nat. Bank v. Norton, 1 Hill, 572; In re Carew, 31 Beav. 39; Gould v. Cayuga Co. Nat. Bank, 56 How. Pr. 505; Farmers' etc. Bank v. Payne, *supra*; Smith v. Bank, 32 Vt. 341; 76 Am. Dec. 179.

² Westfield Bank v. Cornen, 37 N. Y. 320; 93 Am. Dec. 573.

³ Bank of Pittsburgh v. Whitehead, 10 Watts, 397; 36 Am. Dec. 186.

⁴ Loomis v. Eagle Bank, 1 Dian. 285.

⁵ Shaw v. Clark, 49 Mich. 384; 43 Am. Rep. 474.

⁶ Mobile Branch Bank v. Collins, 7 Ala. 95; Mobile Branch Bank v. Scott, 7 Ala. 107.

⁷ Mobile Branch Bank v. Collins, 7 Ala. 95. See Agency, title I.

purchase-money: *Lyman v. United States Bank*, 12 How. 225; 1 Blatchf. 297. A shipped a cargo to B, and gave him authority to sell it. B indorsed the bill of lading and pledged the cargo to a bank, of which he was a director, as security for a loan by the bank to him. This loan was approved by the board. *Held*, that B's knowledge of the fraud was not imputable to the bank: *Innerarity v. Merchants' Bank*, 139 Mass. 332; 52 Am. Rep. 710. A director of a bank, who was also a member of a firm, procured at the bank the discount of a note belonging to the firm, not himself acting in making the discount. The note had been obtained from the maker by fraud, to the director's knowledge, but he did not communicate this fact to the bank. *Held*, that his knowledge was not constructive notice to the bank: *First National Bank of Hightstown v. Christopher*, 40 N. J. L. 435; 29 Am. Rep. 262. A banking corporation was instituted under a statute which provided that no director or other officer of the bank should borrow any money from the bank, under penalty of fine and imprisonment. The president of the bank, who was also a director, borrowed a large sum of money from the bank, and afterward made an assignment of his property for the benefit of his creditors. On an appeal from an order allowing the claim of the bank under the loan, *held*, that the contract arising from the loan was enforceable, though prohibited by statute, and that the lien of the bank on property in the hands of the assignee was good to the extent of the loan: *Lester v. Howard Bank*, 33 Md. 558; 3 Am. Rep. 211. The cashier of a national bank, who had executed no bond, was guilty of embezzling the funds, discovery whereof might have been effected by the use of slight diligence on the part of the directory. They, however, published, according to law, a statement of the condition of the bank, from which it appeared that its affairs were being prudently and honestly administered, and from which the public had a right to believe that he was trustworthy. Afterwards, persons who had seen this report became sureties on the official bond of the cashier, and for his subsequent embezzlements were sought to be held liable thereon. *Held*, that the sureties were released: *Graves v. Lebanon Nat. Bank*, 10 Bush, 23.

§ 521. **Liabilities of.**—Like other directors, they are trustees for the stockholders and the bank, and must be vigilant in their trust, and must not have conflicting interests.¹ They are trustees for depositors as well as for

¹ *Baird v. Bank of Washington*, 11 Bridge Co., 8 Kan. 466; *Ex parte Serg. & R.* 411; *Butts v. Wood*, 38 Robinson, 2 De Gex, M. & G. 517; *Ex parte Barb.* 181; *Hale v. Republican River* *parte Bennett*, 18 Beav. 339; *Cumber-*

stockholders.¹ They are personally liable for losses arising from neglect or misconduct.² But not for errors of judgment,³ unless the act was so grossly wrong as to raise a presumption of fraud or want of knowledge necessary to discharge the duties of the position.⁴ They must use ordinary diligence in the management of the bank's affairs, and in understanding its resources and liabilities, and cannot be heard to say that they were not apprised of facts, the existence of which is shown by the books, accounts, and correspondence of the bank, or which, with the exercise of such diligence, might otherwise have been known.⁵ Where a bill in equity avers a long and systematic violation of a savings-bank charter by the president

land etc. *Coal Co. v. Parish*, 42 Md. 598; *Commissioners etc. v. Reynolds*, 44 Ind. 509; 15 Am. Rep. 245; *Richards v. New Hampshire Ins. Co.*, 43 N. H. 263; see *European etc. R.R. Co. v. Poor*, 59 Me. 277; *Conynham's Appeal*, 57 Pa. St. 474; *Bradley v. Farwell*, 1 Holmes, 433.

¹ *Delano v. Case*, 121 Ill. 247; 2 Am. St. Rep. 81.

² *Delano v. Case*, 121 Ill. 247; 2 Am. St. Rep. 81; *Bank v. St. John*, 25 Ala. 566; *Conant v. Seneca Co. Bank*, 1 Ohio St. 298; *Gunkle's Appeal*, 48 Pa. St. 13; *United Soc. of Shakers v. Underwood*, 9 Bush, 609; 15 Am. Rep. 731; *Chester v. Hilliard*, 34 N. J. Eq. 341; *Brinckerhoff v. Bostwick*, 88 N. Y. 52; *Mutual Building Fund etc. Sav. Bank v. Bossieux*, 4 Hughes, 387; *Ackerman v. Halsey*, 37 N. J. Eq. 356, the chancellor saying: "As a general rule, the directors of a corporation are only required in the management of its affairs to keep within the limits of its powers, and to exercise good faith and honesty. They only undertake, by virtue of their assumption of the duties incumbent on them, to perform those duties according to the best of their judgment and with reasonable diligence, and a mere error of judgment will not subject them to personal liability for its consequences. And unless there has been some violation of the charter or the constituting instruments of the company, or unless there is shown to be a

want of good faith, or a willful abuse of discretion or negligence, there will be no personal liability. They are personally only bound, in the management of the affairs of the corporation, to use reasonable diligence and prudence, such as men usually exercise in the management of their own affairs of a similar nature: *Field on Corporations*, 169, 171; *Angell and Ames on Corporations*, 314; *Spering's Appeal*, 71 Pa. St. 11; 10 Am. Rep. 684; *Overend and Gurney Co., L. R. 5 H. L. 480*; *Hodges v. N. E. Screw Co.*, 1 R. I. 312; 53 Am. Dec. 624; *Citizens' Building Association v. Coriell*, 7 Stew. Eq. 383. But they are personally liable if they suffer the corporate funds or property to be wasted by gross negligence and inattention to the duties of their trust: *Robinson v. Smith*, 3 Paige, 222; 24 Am. Dec. 212; *Citizens' Building Association v. Coriell*, *supra*."

³ *Spering's Appeal*, 71 Pa. St. 11; 10 Am. Rep. 684; *Morins v. Lee*, 30 Fed. Rep. 298; *Witters v. Sowles*, 31 Fed. Rep. 1; *Godbold v. Bank*, 11 Ala. 191; 46 Am. Dec. 211.

⁴ *Godbold v. Bank*, 11 Ala. 191; 46 Am. Dec. 211.

⁵ *United Soc. of Shakers v. Underwood*, 9 Bush, 609; 15 Am. Rep. 731; *Paine v. Irwin*, 19 Kan. 60; *Williams v. McDonald*, 37 N. J. Eq. 341; *Bank v. St. John*, 25 Ala. 566; *Graves v. Bank*, 10 Bush, 23; 19 Am. Rep. 50.

and committee-men, the managers cannot demur on the ground that the misconduct was not traced to them. *Prima facie*, they must be presumed to have known of it, and they are liable for injury from want of ordinary care.¹ Where by their gross negligence or misconduct they allow the funds of the bank to be lost or wasted, they are liable for the damages in an action by the bank,² or its receiver,³ or in case the bank or receiver refuses to sue, or the receiver is a director, by a stockholder who has been compelled to contribute to the payment of the loss,⁴ or a depositor who has suffered thereby.⁵ They are liable for the issuance of bank bills contrary to the charter of the bank;⁶ for the declaring and payment of dividends declared but not earned;⁷ for the fraudulent sale to the bank of its own stock;⁸ for receiving deposits when they know or with proper attention may learn that the bank is insolvent;⁹ for holding the bank out as solvent when it is not so.¹⁰ A person who holds the office of director and vice-president of a bank, and at the same time has private and personal dealings with the bank, is conclusively presumed to know, so far as the same affects his personal dealings, the general condition and management of his bank, and to know everything of importance that occurs

¹ *Williams v. McKay*, 40 N. J. Eq. 189; 53 Am. Rep. 775.

² *Chester v. Halliard*, 34 N. J. Eq. 341.

³ *Brinckerhoff v. Bostwick*, 88 N. Y. 52; *Mutual Building Fund etc. Sav. Bank v. Bossieux*, 4 Hughes, 387; *Van Dyck v. McQuade*, 45 N. Y. Sup. Ct. 620.

⁴ *Brinckerhoff v. Bostwick*, 88 N. Y. 52; *Nelson v. Burrows*, 9 Abb. N. C. 280; *Ackerman v. Halsey*, 37 N. J. Eq. 356.

⁵ *Chester v. Halliard*, 34 N. J. Eq. 341; *Maisch v. Sav. Bank*, 5 Phila. 30.

⁶ *Schley v. Dixon*, 24 Ga. 273; 71 Am. Dec. 121; *Moultrie v. Hoge*, 21 Ga. 513. But by the expiration of the charter, the personal liability of directors for over-issues is extinguished:

Moultrie v. Hoge, *supra*. They are not, however, released from liability by an assignment to which the creditors are not parties, nor consenting: *Schley v. Dixon*, *supra*. A trustee of a savings bank may be released from liability for an illegal investment, on payment of the loss by a subsequent trustee: *Hun v. Van Dyck*, 26 Hun, 567. And the directors are not liable to a holder of bills which have depreciated through their fault or misconduct: *Branch v. Roberts*, 50 Barb. 435.

⁷ *Van Dyck v. McQuade*, 45 N. Y. Sup. Ct. 620; 57 How. Pr. 62.

⁸ *Schultz v. Christman*, 6 Mo. App. 338; and see *Abeles v. Cochran*, 22 Kan. 405; 31 Am. Rep. 194.

⁹ *Delano v. Case*, 17 Ill. App. 531.

¹⁰ *Delano v. Case*, 121 Ill. 247; 2 Am. St. Rep. 81.

therein, either at the time it occurs or soon thereafter. He is bound to know when his bank is in an embarrassed condition, and the condition of an account which has been overdrawn for several months.¹

They are not liable for the non-exercise of powers which were discretionary on their part,² nor for the dishonesty or negligence of the cashier or other officers,³ nor for investments which turn out losses,⁴ nor for false statements in articles of association inducing a party to subscribe to stock,⁵ nor for violations of law occurring before the plaintiff became a stockholder.⁶ The publication by savings-bank directors, that directors and stockholders are personally responsible for its debts, does not constitute a contract with depositors, but, if intentionally false, affords the basis of an action for deceit.⁷ Where the directors are made personally liable by statute, where the debts of the bank exceed a certain amount, it will not avail a single director to show that he was absent, or that he dissented. Such a provision is remedial, not penal, and the liability is joint, not several.⁸ Where it is provided by statute that an officer of a bank receiving a deposit with knowledge of its insolvent condition shall be personally liable therefor, in an action under such a statute it is only necessary to show the insolvency of the bank. The burden of proof of want of knowledge is on the defendant.⁹ Where by statute it is provided that the directors shall be liable for the bank's debts in case of insolvency,

¹ *German Sav. Bank v. Wulfekhurler*, 19 Kan. 60.

² *Williams v. Halliard*, 38 N. J. Eq. 373.

³ *Dunn v. Kyle*, 14 Bush, 134; provided they have not been negligent: *Spering's Appeal*, 71 Pa. St. 11; 10 Am. Rep. 684; *Bank v. St. John*, 25 Ala. 566; *Godbold v. Mobile Bank*, 11 Ala. 191; 46 Am. Dec. 211.

⁴ *Williams v. McDonald*, 37 N. J. Eq. 409.

⁵ *Mabey v. Adams*, 3 Bosw. 346.

⁶ *Mabey v. Adams*, 3 Bosw. 346.

⁷ *Westervelt v. Demarest*, 46 N. J. L. 37; 50 Am. Rep. 400.

⁸ *Banks v. Darden*, 18 Ga. 318. Certificates of deposit are debts within the meaning of a statute providing that the debts shall not exceed a prescribed amount, "whether by bond, bill, note, or other security": *Hargroves v. Chambers*, 30 Ga. 580.

⁹ *Dodge v. Martin*, 17 Fed. Rep. 660.

it has been held that where the statute authorizing the forming of the bank is unconstitutional, the directors cannot be made to respond under such a provision, the bank being illegal.¹ Directors are personally liable in debt as for a penalty, and not upon a contract liability, to be brought by any creditor for the benefit of all, for an amount measured by the amount of excess of indebtedness, where the charter of the bank prohibits it from creating an indebtedness beyond a certain amount, and provides that the directors who participate in the violation of the provision shall be liable for the excess in their individual capacities in an action of debt prosecuted by any creditor of the bank.² Bank depositors cannot maintain a suit in equity against the managers of the bank without joining the bank itself, on account of losses occasioned to the bank by the misconduct of the managers.³ Where no proceeding is pending under the national bank law for forfeiture of the charter of a bank, its receiver may in a state court maintain an action against its directors to recover damages sustained through their gross neglect of their duties,—allowing its funds to be lost or wasted.⁴ No liability attaches unless the party sought to be charged as director has accepted the office or held himself out as such.⁵ But it is not essential that he should have acted as a director.⁶ And they are not liable for the acts of their predecessors or successors.⁷ But it is no defense to a statutory liability to show a judg-

¹ *Brooks v. Hill*, 1 Mich. 118. The Missouri statute, which provides that all bank officers who have assented to the receiving of deposits after knowledge of its insolvency may be proceeded against severally or jointly, was held to give no right of action to the depositor: *Fischer v. Tamm*, 13 Mo. App. 108. A charter of a bank, making the individual property of the stockholders liable for the redemption of its bills in proportion to the amount of his stock, entitles the holder of two judgments against the bank to be first

paid from any money raised by the sheriff out of a stockholder's property: *Lowry v. Parsons*, 52 Ga. 356.

² *Sturges v. Burton*, 8 Ohio St. 215; 72 Am. Dec. 582.

³ *Chester v. Halliard*, 36 N. J. Eq. 313.

⁴ *Brinckerhoff v. Bostwick*, 88 N. Y. 52.

⁵ *Hume v. Com. Bank*, 9 Lea, 728.

⁶ *Ridenour v. Mayo*, 40 Ohio St. 9.

⁷ *Schley v. Dixon*, 24 Ga. 273; 71 Am. Dec. 121.

ment of forfeiture, or the expiration of the charter by its own limitation.¹

ILLUSTRATIONS. — A bill was filed by a stockholder of a national bank against the president and directors, alleging gross neglect of duty and mismanagement in permitting the cashier to misappropriate over two millions of dollars, where reasonable care would have prevented it. The bill alleged in detail that the directors utterly neglected to discharge any of the duties of their office; that the bank had been ruined; that the complainant had lost his stock and been obliged to pay an assessment; that a receiver had been appointed, and that he had failed to bring suit, although requested so to do by the complainant. *Held*, that such a bill would lie: *Ackerman v. Halsey*, 37 N. J. Eq. 356. A director of and depositor in a bank, knowing that it probably was insolvent, obtained from the cashier bank securities equal to the amount of the deposit. *Held*, that he must surrender them for the benefit of depositors and creditors generally: *Lamb v. Cecil*, 28 W. Va. 653; *Lamb v. Pannell*, 28 W. Va. 663. The money of a bank was lost by misconduct of the directors, consisting of gross negligence and habitual inattention to their duties. The bank was adjudicated bankrupt, and trustees were appointed. *Held*, that the trustees could maintain an action against the directors, and that such action was properly brought in equity: *Mutual etc. Sav. Bank v. Bossieux*, 4 Hughes, 387. The cashier for nine years had been making false entries, and had embezzled a large amount. The services of the directors were gratuitous. At the merger of an old bank in a new one, no new books had been opened, thus enabling the cashier to conceal his former defalcations, but there was nothing to excite suspicion as to the cashier's honesty, the frauds being perpetrated by false entries, which made the weekly statements apparently correct; the duties of cashier, book-keeper, and teller were all performed by the defaulting cashier. *Held*, that the directors were not liable: *Savings Bank of Louisville v. Caperton*, Ky., 1888.

§ 522. President—Powers and Duties of—Liabilities of.—The president is the general executive officer of the bank, appointed by the board of directors, as a rule from among themselves.² He has a right to preside at the meetings of the board,³ to employ counsel, and conduct

¹ *Hargroves v. Chambers*, 30 Ga. 580.

² *Hazleton v. Bank*, 32 Wis. 34.

³ *Crawford v. Bank*, 7 Ala. 205.

litigation of the bank,¹ to make admissions binding the bank,² to assign mortgages for shares of the bank,³ to receive deposits and issue certificates therefor,⁴ certify checks drawn upon the bank (except when drawn by himself),⁵ and receive notice for the bank.⁶ After a national bank has, by its share-holders, decided to go into liquidation, its president upon giving paper held by the bank to creditors of the bank, as collateral security for their claims, has authority to indorse or guarantee such paper in the name of the bank so as to bind the bank and its share-holders.⁷ In fine, the president has, as inherent in his office, all such powers as are necessary to the transaction of the usual business of the bank in the usual way; or, as has been said, which come within the scope of the general usage, practice, and course of business conducted by the bank.⁸ A clause in bank charters, requiring contracts to be signed by the president and countersigned by the cashier, does not apply to such contracts or engagements as occur in or are necessary to the ordinary business of a cashier or agent, such as drawing or indorsing bills of exchange, checks, and drafts.⁹ Where a president of a bank has the power to take a claim against the bank out of the operation of the statute of limitations, the power may be exercised out of the state wherein the bank is situated as well as in it.¹⁰ But the president

¹ *Savings Bank v. Benton*, 2 Met. (Ky.) 240; *Am. Ins. Co. v. Oakley*, 9 Paige, 496; 38 Am. Dec. 501; *Mumford v. Hawkins*, 5 Denio, 355; *Blackman v. Bank*, 8 Ala. 103; *Case v. Hawkins*, 53 Miss. 702; *Winton v. Little*, 94 Pa. St. 64; see *Citizens' Bank v. Keim*, 10 Phila. 311; *State v. Citizens' Bank*, 31 La. Ann. 836; *Spyker v. Spence*, 8 Ala. 333.

² *Spalding v. Bank*, 9 Pa. St. 28; *Gould v. Cayuga Nat. Bank*, 56 How. Pr. 505; *Hazleton v. Bank*, 32 Wis. 34; *Bank of Monroe v. Field*, 2 Hill, 445; but see *Cunningham v. Cochran*, 18 Ala. 479; 52 Am. Dec. 230.

³ *Valk v. Crandall*, 1 Sand. Ch. 179.

⁴ *Hazleton v. Bank*, 32 Wis. 34.

⁵ *Claffin v. Farmers' Bank*, 25 N. Y. 293.

⁶ *Porter v. Bank*, 19 Vt. 410.

⁷ *Irons v. Manufacturers' Bank*, 27 Fed. Rep. 591.

⁸ *Minor v. Mechanics' Bank of Alexandria*, 1 Pet. 46; *Neiffer v. Bank of Knoxville*, 1 Head, 162; see also *Wyman v. Hallowell and Augusta Bank*, 14 Mass. 58; 7 Am. Dec. 194; *Salem Bank v. Gloucester Bank*, 17 Mass. 1; 9 Am. Dec. 111; *Foster v. Essex Bank*, 17 Mass. 479; 9 Am. Dec. 168; *Austin v. Daniels*, 4 Denio, 299.

⁹ *Merchants' Bank v. Bank*, 1 Ga. 418; 44 Am. Dec. 665.

¹⁰ *Morgan v. Bank*, 13 Lea, 234.

has no implied power to execute a mortgage of the bank property,¹ or to purchase real estate for the bank,² or assign the corporate property,³ or make an accommodation indorsement,⁴ or to release claims of the bank against parties,⁵ or charge it with a debt by his admissions,⁶ or to dispose of notes belonging to the bank,⁷ or to borrow money for the bank.⁸

A general authority to the president of a bank, to certify checks drawn upon it, does not extend to checks drawn by himself.⁹ A power of attorney to institute suit, executed by the president of a bank without authority from the board of directors, is not sufficient.¹⁰ By authority of the board of directors, he may exercise wider powers. He may be authorized by the directors to do any act which they are authorized by their charter to do, unless the act can by the charter be done only by the directors themselves.¹¹ And such authority need not be expressly conferred.¹² A president of a bank, who negotiates a settlement with an indorser on matured paper held by his bank, acts as the bank's agent, and whatever he does within the apparent scope of his authority to obtain the new secu-

¹ *Leggett v. N. J. Bank Co.*, 1 N. J. Eq. 541; 23 Am. Dec. 728.

² *Libby v. Union Bank*, 99 Ill. 622.

³ *Hoyt v. Thompson*, 5 N. Y. 320.

⁴ *Bank of Genesee v. Patchen Bank*, 13 N. Y. 309; 19 N. Y. 312.

⁵ *Olney v. Chadsey*, 7 R. I. 224; *Hodge v. Bank*, 22 Gratt. 51; *Gallery v. Bank*, 41 Mich. 169; 32 Am. Rep. 149. The satisfaction piece of a judgment recovered in favor of a bank, executed and delivered to the judgment debtor, by the president of a bank, who had no authority in fact to receive the money, running in the president's name as such, and signed by him as president, without the corporate seal, and not referring to or announcing the act as that of the bank, is not a satisfaction of the judgment by the bank: *Booth v. Farmers' etc. Bank*, 4 Lans. 301.

⁶ *Henry v. Northern Bank*, 63 Ala. 527.

⁷ *Central City Bank v. Lucas*, 21 Neb. 280.

⁸ *Fifth Ward Savings Bank v. Jersey City Bank*, 47 N. J. L. 357.

⁹ *Claffin v. Farmers' etc. Bank*, 25 N. Y. 293.

¹⁰ *Citizens' Bank v. Keim*, 10 Phila. 311.

¹¹ *Bank of East Tennessee v. Hooke*, 1 Cold. 156; *Rhodes v. Webb*, 24 Minn. 292; *Bank of Com. v. Bank of Buffalo*, 6 Paige, 497; *Percy v. Millandon*, 3 La. 568; *Bank of Healdsburg, v. Bailhache*, 65 Cal. 327; *Wellsburg Bank v. Kimberlands*, 16 W. Va. 555; *Smith v. Lawson*, 18 W. Va. 212; 41 Am. Rep. 688.

¹² *Reed v. State Nat. Bank*, 7 Neb. 201; *Winton v. Little*, 94 Pa. St. 64; *Eastern Townships Bank v. Vermont Nat. Bank*, 22 Fed. Rep. 186; *Benton v. Benley*, 9 Biss. 253; *Wellsburg Bank v. Kimberlands*, 16 W. Va. 555.

rity binds the bank which accepts and holds the security.¹

The president is personally liable for want of ordinary care in the discharge of his duties.² He is personally liable where the bank is not legally organized;³ where he makes a debt in excess of the charter limit;⁴ where he directs or permits overdrafts;⁵ where he allows a customer to take securities of the bank away for inspection.⁶ Where two members of a firm are the president and cashier, respectively, of a bank, their knowledge of the firm's insolvency is that of the bank.⁷ The identity between the name of the drawer of a check and the president of the bank who certified it does not, *per se*, inform any one that the president had certified his own checks without funds in the bank, and though this be in fact the case, yet it will not deprive the owner of the protection afforded to holders in good faith.⁸ A court of equity will not, on the ground of alleged misfeasance, grant an injunction restraining the president or cashier in the exercise of his official duties;⁹ nor where an officer of a bank fraudulently abstracts the funds, and invests them in his own name, will the court declare him a trustee, and indemnify the bank out of the investment.¹⁰ The law raises no implied promise to pay the president of a bank for his official services; nor can he recover pay for such services

¹ *Cake v. Bank*, 116 Pa. St. 264; 2 Am. St. Rep. 600.

² *Dunn v. Kyle*, 14 Bush, 134; *Brannin v. Loving*, 82 Ky. 370; *Hauser v. Tate*, 55 N. C. 81; 39 Am. Rep. 689.

³ *Hauser v. Tate*, 85 N. C. 81; 39 Am. Rep. 689.

⁴ *Brannin v. Loving*, 82 Ky. 370.

⁵ *Oakland Bank v. Wilcox*, 60 Cal. 126. A president of a bank who, knowing a customer to be without means, induces him to open an account at the bank, and to overdraw that account, and who by his orders to the cashier establishes the custom of paying such overdrafts, may be held liable to the bank for the amount of the over-

drafts: *Oakland Savings Bank v. Wilcox*, 60 Cal. 126. The president of a bank having placed the money of a depositor to his own credit, instead of the depositor, and then having allowed the depositor to withdraw, becomes debtor to the bank, and such debt carries interest: *Estate of Boker*, 7 Phila. 479.

⁶ *Citizens' Bank v. Wiegand*, 12 Phila. 496.

⁷ *Nisbet v. Macon Bank and Trust Co.*, 4 Woods, 464.

⁸ *Clafin v. Farmers' etc. Bank*, 36 Barb. 540.

⁹ *Bayliss v. Orne*, 1 Freem. Ch. 61.

¹⁰ *Pascoag Bank v. Hunt*, 3 Edw. 583.

upon a *quantum meruit*.¹ The president of a bank cannot maintain any claim for guaranteeing its paper, without proof of a clear and explicit contract to that effect.²

ILLUSTRATIONS.—Land conveyed in trust to secure a debt due a bank was sold under a prior encumbrance. The president of the bank bought in the land, took a deed in his own name, turned over the note held by the bank, and gave his own note, secured by deed of trust for the balance of the price. *Held*, that the transaction having been intended for the benefit of the bank, the bank should be compelled to assume it, and to pay the note given by him: *Libby v. Union Bank*, 99 Ill. 622. After an insolvent bank was sued, its president, without consulting its directors or stockholders, executed in its behalf a conveyance for the benefit of creditors. *Held*, made without authority, and in the absence of evidence of ratification, ratification could not be presumed: *McKeag v. Collins*, 87 Mo. 164. A bank president, while in general charge of the business with the cashier under his authority, permitted and directed the drawing of moneys from the bank, without security, by one known to be irresponsible, and with whom he was interested in the business for which the money was obtained, and requested the cashier not to say anything to the directors about it. *Held*, that he was personally liable to the bank for the moneys thus paid out by him: *First Nat. Bank v. Reed*, 36 Mich. 263. The president of a bank became treasurer of a voluntary association, and as such treasurer opened an account with his bank and deposited their funds there, which account he overdraw by a check drawn by him as treasurer. *Held*, that the bank could recover the amount of the overdraft from the members of the association. He drew as their agent. The fact that he was at the time the president of the bank made no difference: *Tradesman's Bank v. Astor*, 11 Wend. 87.

§ 523. Cashier of Bank—Authority of—Liabilities.—

The cashier of a bank is, by virtue of his office, the general agent of the bank, with general authority in the bank's business;³ and all his acts in the general course of the busi-

¹ *Holland v. Lewiston Falls Bank*, 52 Me. 564; *Sawyer v. Pawner's Bank*, 6 Allen, 207.

² *Leavitt v. Beers*, Hill & D. 221.

³ *Wild v. Bank*, 3 Mason, 506; *Everett v. United States*, 6 Port. 166; 30 Am. Dec. 584; *Minor v. Bank*, 1 Pet. 46; *Bridenbecker v. Lowell*, 32 Barb. 9; *Bissell v. Bank*, 69 Pa. St.

415; *United States v. City Bank*, 21 How. 356; *Baldwin v. Bank*, 1 Wall. 234; *City Bank v. Perkins*, 4 Bosw. 420; *Caldwell v. Mohawk etc. Bank*, 64 Barb. 333; *Bank v. Schuylkill Bank*, Para. Sel. Cas. 180; *State v. Com. Bank*, 6 Smedes & M. 218; 45 Am. Dec. 280; *Merchants' Bank v. State Bank*, 10 Wall. 604.

ness of the bank will bind it.¹ The cashier, and not the president, is the officer whose duty it is to receive directly or through subordinate officers the funds of the bank, and conduct its moneyed operations.² The ordinary acts of a bank cashier are presumed to have been ratified or authorized. Evidence of his appointment is unnecessary.³ Where the directors allow its cashier to conduct all its business without interference for several years together, they thereby confer upon him authority, as to third persons, to transact any business on behalf of the bank which he is not prohibited by its charter from transacting.⁴ The duties of a cashier are to direct subordinate officers,⁵ to transfer shares,⁶ to manage the correspondence,⁷ to accept or refuse accounts with the bank,⁸ to keep the funds, notes, bills, and other choses in action of the bank to be used as the exigencies of the bank may demand,⁹ to receive all moneys and notes of the bank, to surrender notes and other securities when paid, to draw checks, to withdraw funds of the bank on deposit, and generally to transact the ordinary routine of business.¹⁰

¹ Merchants' Bank v. State Bank, 10 Wall. 604; Wakefield Bank v. Truesdell, 55 Barb. 602; Caldwell v. Mohawk Bank, 64 Barb. 333; Lloyd v. Bank, 15 Pa. St. 172; 53 Am. Dec. 581; Com. Bank v. Kortright, 22 Wend. 348.

² Merchants' Bank v. Rawls, 7 Ga. 191; 50 Am. Dec. 394.

³ Reynolds v. Collins, 78 Ala. 94.

⁴ City Bank v. Perkins, 4 Bosw. 420.

⁵ Merchants' Bank v. State Bank, *supra*. It is not negligence for a bank to intrust the cashier to hire and pay out of his salary all the clerks and other servants employed in the banking room: Smith v. First Nat. Bank, 99 Mass. 605.

⁶ Com. Bank v. Kortright, 22 Wend. 348; Smith v. Northampton Bank, 4 Cush. 1.

⁷ Branch Bank v. Steele, 10 Ala. 915; New Hope etc. Bridge Co. v. Phenix Bank, 3 N. Y. 156.

⁸ Thatcher v. Bank, 5 Sand. 121.

⁹ Franklin Bank v. Steward, 37 Me. 519; Wild v. Bank, 3 Mason, 505; State Bank v. Wheeler, 21 Ind. 90.

¹⁰ United States v. City Bank, 21 How. 356; Morse v. Bank, 1 Holmes, 209; Kimball v. Cleveland, 4 Mich. 606; Sturges v. Bank, 11 Ohio St. 153; 78 Am. Dec. 296. The cashier of a bank has a general authority to superintend the collection of notes under protest, and to make such arrangements as may facilitate that object, and to do anything in relation thereto that an attorney might lawfully do. His authority does not, however, extend so far as to justify him in altering the nature of the debt, or in changing the relation of the bank from that of a creditor to that of an agent of its debtor; although a subsequent acquiescence of the bank in such an exercise of power may ratify and confirm it: Bank of Pennsylvania v. Reed, 1 Watts & S. 101; Payne v. Commercial Bank, 6 Smedes & M. 24.

He has authority to receive securities for safe-keeping when this is customary with the bank;¹ to transfer and indorse negotiable securities of the bank,² to certify checks when the drawer has funds on deposit,³ to indorse for collection notes discounted, deposited to be collected or deposited as collateral security,⁴ to compromise a claim or take security for it,⁵ borrow money for the bank;⁶ give a promissory note for the bank's debt;⁷ to employ an attorney to collect a claim, although the directors have

¹ First Nat. Bank v. Graham, 100 U. S. 699.

² Ryan v. Dunlap, 17 Ill. 40; 63 Am. Dec. 334; Pratt v. Topeka Bank, 12 Kan. 570; Ridgway v. Farmers' Bank, 12 Serg. & R. 256; 14 Am. Dec. 681; Fleckner v. Bank of U. S., 8 Wheat. 338; State Bank v. Wheeler, 21 Ind. 90; Robb v. Ross County Bank, 41 Barb. 586; see Folger v. Chase, 18 Pick. 63; State Bank v. Fox, 3 Blatchf. 431; Houghton v. First Nat. Bank, 26 Wis. 663; 7 Am. Rep. 107; Elwell v. Dodge, 33 Barb. 336; Bissell v. First Nat. Bank, 69 Pa. St. 415; Farrar v. Gilman, 19 Me. 440; 36 Am. Dec. 766; City Bank v. Perkins, 29 N. Y. 554; 86 Am. Dec. 332. The words "G. B., Cas.," indorsed upon a note, are sufficient in form to bind the bank of which G. B. is cashier. Such indorsement, although made upon a note not belonging to the bank, and merely for the accommodation of the payee or prior indorser, will bind the bank as against a purchaser in good faith, for value, before maturity: Houghton v. First Nat. Bank, 26 Wis. 663; 7 Am. Rep. 107; see Elliot v. Abbot, 12 N. H. 549; 37 Am. Dec. 227.

³ Although the bank may limit his authority, this would not affect those who had no notice of the limitation. If the drawer is without funds, as between the cashier and the bank, the cashier has no power to make a certification, but as between the bank and the *bona fide* holder of a check so certified, as the cashier acts apparently within the scope of his authority, the bank will be bound: Cook v. State National Bank, 52 N. Y. 96; 11 Am. Rep. 667; Merchants' Bank v. State

Bank, 10 Wall. 604, 649, 650; Barnes v. Ontario Bank, 19 N. Y. 152. The want of an officer's authority to certify a check may appear on the face of the paper, in which case no one could claim the protection of a *bona fide* holder: Clarke National Bank v. Bank of Albion, 52 Barb. 592; Clafin v. Farmers' etc. Bank, 25 N. Y. 293; Dorsey v. Abrams, 85 Pa. St. 299; 27 Am. Rep. 657. If the cashier of a bank should pay to a *bona fide* holder the amount of a forged check drawn on the bank, or of forged notes of the bank, the payment cannot be recalled; because he is intrusted by the bank with an implied authority to decide on the genuineness of the handwriting of the drawer of the check, and of the paper of the bank: Bank of United States v. Bank of Georgia, 10 Wheat. 333; Salem Bank v. Gloucester Bank, 17 Mass. 1; 9 Am. Dec. 111; Merchants' Bank v. Marine Bank, 3 Gill, 96; 43 Am. Dec. 300.

⁴ Corser v. Paul, 41 N. H. 24; 77 Am. Dec. 753; Potter v. Bank, 28 N. Y. 641; 86 Am. Dec. 273.

⁵ Eastman v. Coos Bank, 1 N. H. 23; Mitchell v. Cook, 29 Barb. 243; United States v. City Bank, 21 How. 356; Corser v. Paul, 41 N. H. 24; 77 Am. Dec. 753; Hartford Bank v. Barry, 17 Mass. 94; Bank of Pa. v. Reed, 1 Watts & S. 101; Bridenbecker v. Lowell, 32 Barb. 9; Payne v. Commercial Bank, 6 Smedes & M. 24.

⁶ Ballston Spa Bank v. Marine Bank, 16 Wis. 120; Sturges v. Bank, 11 Ohio St. 153; 78 Am. Dec. 296; Donnell v. Sav. Bank, 80 Mo. 165.

⁷ Barnes v. Ontario Bank, 19 N. Y. 152.

appointed an attorney to take charge of the land, business, and affairs of the bank.¹ He may bind the bank by his admissions and statements made in the course of his duties.² But notice to a bank is not inferred from notice to its cashier, when it is in respect to a matter outside of the ordinary business of the bank, in regard to which an attorney had been employed to act for the bank, and the cashier never having communicated to the board of trustees the matters of which he had notice.³

But it has been held that a bank cashier has no implied authority to authorize a director to contract with the government to transport money of the United States free of charge;⁴ nor to certify a post-dated check;⁵ nor to pledge the assets of the bank for the payment of an antecedent debt;⁶ nor to settle a foreign account by receiving unsecured notes of individuals;⁷ nor to receive property in safe-keeping outside of the ordinary business of banking;⁸ nor to bargain or sell its real estate;⁹ nor to appear and defend suits against the bank;¹⁰ nor to cause a forfeiture of its charter by a direct and palpable violation of his authority or instructions;¹¹ nor to bind his bank by issuing its certificates of deposit to himself;¹² nor to make any declarations binding the bank not within the scope of his ordinary duties, as where he admits forged bills to be genuine, or promises to pay debts which it does not owe;¹³ nor to transfer non-negotiable paper without authority

¹ Root v. Olcott, 42 Hun, 536.

² Sturges v. Bank, 11 Ohio St. 153; 78 Am. Dec. 296; Houghton v. Bank, 26 Wis. 663; 7 Am. Rep. 107; Merchants' Bank v. Marine Bank, 3 Gill, 96; 43 Am. Dec. 300.

³ Wilson v. McCullough, 23 Pa. St. 440; 62 Am. Dec. 347.

⁴ United States v. City Bank, 21 How. 356.

⁵ Clarke Nat. Bank v. Bank, 52 Barb. 592.

⁶ State v. Davis, 50 How. Pr. 447.

⁷ Sandy River Bank v. Merchants' Bank, 1 Biss. 146.

⁸ First Nat. Bank of Lyons v. Ocean Bank, 60 N. Y. 278; 19 Am. Rep. 181.

⁹ Winsor v. Lafayette Co. Bank, 18 Mo. App. 665.

¹⁰ Branch Bank at Mobile v. Poe, 1 Ala. 396.

¹¹ State v. Commercial Bank of Manchester, 6 Smedes & M. 218; 45 Am. Dec. 280.

¹² Leo v. Smith, 84 Mo. 304; 54 Am. Rep. 101.

¹³ Merchants' Bank v. Bank, 3 Gill, 96; 43 Am. Dec. 300.

from the bank;¹ nor to bind his bank by an official indorsement of his individual note;² nor release a surety upon a note held by the bank;³ nor bind the bank to indemnify an officer for levying upon property on an execution in favor of the bank;⁴ nor execute a mortgage on the real estate of the bank;⁵ nor to appear and defend suits against the bank;⁶ nor, in another state, to settle an account, taking private notes and drafts, and giving a receipt in full;⁷ nor to discharge a debtor of the bank without payment.⁸ But if knowing one to be a surety upon a note, he informs him that such note is paid, intending him to believe it, and the surety, relying upon that statement, changes his position toward his principal by indorsing a new note or giving up his securities, the bank will be estopped from denying that the note is paid.⁹ Where a rule of a bank prohibits its officer becoming its debtor, a transaction between the cashier and one who acts with notice of the rule, which is a palpable and colorable evasion thereof, will not affect the bank.¹⁰ A bank officer cannot sell the bank's safe to pay its debt.¹¹ On the insolvency of a bank, the cashier has no lien upon the money in the bank for the payment of his deposit or salary.¹² He is not entitled to the benefit of the statute of limitations as to his own note lying in the bank, unless he shows that he has exhibited it as due and unpaid to the board of directors.¹³ The cashier is personally liable for damages

¹ *Holt v. Bacon*, 25 Miss. 567; *Barrick v. Austin*, 21 Barb. 241. He may by usage release a debt and mortgage due the bank: *Ryan v. Dunlap*, 17 Ill. 40; 63 Am. Dec. 334.

² *West St. Louis Sav. Bank v. Shawnee County Bank*, 3 Dill. 403.

³ *Cochecho Nat. Bank v. Haskell*, 51 N. H. 116; 12 Am. Rep. 67; *Merchants' Bank v. Rudolf*, 5 Neb. 527; *Hodge v. Nat. Bank*, 22 Gratt. 51.

⁴ *Watson v. Bennett*, 12 Barb. 196.

⁵ *Leggett v. N. J. etc. Banking Co.*, 1 N. J. Eq. 541; 23 Am. Dec. 728.

⁶ *Branch Bank of Mobile v. Poe*, 1 Ala. 396.

⁷ *Sandy River Bank v. Merchants' etc. Bank*, 1 Biss. 146.

⁸ *Cochecho Nat. Bank v. Haskell*, 51 N. H. 116; 12 Am. Rep. 67.

⁹ *Cochecho Nat. Bank v. Haskell*, 51 N. H. 116; 12 Am. Rep. 67.

¹⁰ *Savannah Bank and Trust Co. v. Hartridge*, 73 Ga. 223.

¹¹ *Asher v. Sutton*, 31 Kan. 286.

¹² *Bruyn v. Middle Dist. Bank*, 1 Paige, 584.

¹³ *Harrisburg Bank v. Forster*, 8 Watts, 12.

caused by failure to use reasonable skill and ordinary care and diligence in the discharge of his duties.¹ So, likewise, where he is guilty of fraud or commits an illegal act.² A cashier authorized to loan the money of the bank without security is liable for losses resulting from loans without security not entered on the books of the bank, and treated in his reports as cash on hand.³ A cashier is not liable for erroneous information given in good faith to a party respecting the amount of money deposited to his credit by a third person.⁴ Nor where the duty is imposed on him of carrying on the bank's business is he responsible for a neglect of duty in not consulting other officers of the bank or committees, whom, by the by-laws, he is required to consult in making discounts, where such committees hold no meetings, and the officers systematically absent themselves from the performance of their duties.⁵

ILLUSTRATIONS.—H. applied to T., the cashier of a bank, for information concerning the solvency of T., P., & Co. T. replied favorably as to their credit, and, upon this assurance, plaintiff from time to time purchased large amounts of the bills and acceptances of said firm. Eight months later, T., P., & Co. failed, and plaintiff lost two thousand dollars by his investments; thereupon he brought suit against T. and the bank for deceit. *Held*, that answering questions as to the solvency of parties is not within the scope of the business of a bank cashier, and the bank is not liable: *Hortigan v. Bank*, 10 Chic. L. N. 112. It was provided in a bank charter that the funds of the bank should in no case be liable for any contract or engagement, unless the same should be signed by the president and countersigned by the cashier. *Held*, that this did not apply to the ordinary business and duties of a cashier, such as indorsing bills, etc.: *Merchants' Bank v. Central Bank*, 1 Ga. 418; 44 Am. Dec. 665; *Cary v. McDougald*, 7 Ga. 84. A cashier of a bank wrote to a person that a certain bill was "perfectly safe." The latter failed to collect it after using diligence. *Held*, that the act of

¹ *Austin v. Daniela*, 4 Denio, 299; *Com. Bank v. Ten Eyck*, 48 N. Y. 305; *State Bank v. Locke*, 4 Dev. 529.

² *San Joaquin Valley Bank v. Bours*, 65 Cal. 247.

³ *Herrin v. Franklin Bank*, 32 Vt.

⁴ *Com. Bank of Albany v. Ten Eyck*, 274.

48 N. Y. 305; *Minor v. Bank*, 1 Pet. Stroh, 403.

⁵ *Second Nat. Bank of Oswego v. Burt*, 93 N. Y. 233.

the cashier was a warranty that the bill was collectible, and the bank was liable: *Sturges v. Bank*, 11 Ohio St. 153; 78 Am. Dec. 296. A cashier forwarded certain bonds pledged to his bank as collateral security to responsible brokers for sale, drawing against them for a portion of the value of the bonds. His draft was accepted and paid. He negligently omitted to inquire after the securities, or to collect the balance realized from their sale. The brokers, with knowledge of the interest of the bank, wrongfully applied such balance upon a claim of their own against the pledgor of the bonds to the bank. *Held*, that he was not liable for want of care: *Commercial Bank v. Ten Eyck*, 48 N. Y. 305. The president and the cashier of a bank were engaged in establishing a new banking association, and purchased state stock for the purpose on credit, and assumed to give the security of the bank of which they were officers for it. Subsequently the cashier, with the assent of the president, took money of the bank in order to pay for it. *Held*, that the cashier was liable to the receiver of the bank for the amount: *Austin v. Daniels*, 4 Denio, 299. A cashier of a bank, for the purpose of raising money, gave its agent a certificate of deposit for five thousand dollars, though no such deposit had been made. This, with the agent's indorsement upon it, was sold by a third party to the plaintiff at a discount of eighty dollars over and above interest and exchange, and upon condition that it should not be presented until after thirty days. *Held*, that these facts were not sufficient to oblige the plaintiff to produce evidence that he was a *bona fide* holder: *Barnes v. Ontario Bank*, 19 N. Y. 152. By mistake, a credit was erroneously entered in the account of a cashier with the receiver of the bank, which had stopped payment, and after the books were balanced, the cashier disposed of bills of the bank belonging to him at the time of the settlement at a large discount. *Held*, that on the discovery of the mistake the cashier was entitled to set off, against the balance found due from him, bills of the bank purchased by him subsequent to the discovery of the mistake: *Beers v. Maynard*, 1 Bail. Ch. 168. A bank cashier arranged with A that A should accept the bank's drafts, on condition that the bank should keep a corresponding balance with A to A's credit, on which balance A should have a lien as security for his liability, and should be kept informed of the condition of the bank, and have at any time the right to take the balance to pay the acceptances. *Held*, that this agreement was within the power of the cashier to make, and bound the bank; and that, upon notice from the bank of its insolvency, A was entitled to apply the balance in pursuance of the agreement as against the assignee in insolvency: *Coals v. Donnell*, 94 N. Y. 168. B. was cashier of a national bank and treasurer of a savings bank. He took bonds

belonging to the savings bank, and as cashier and manager of the national bank pledged them as security for advance to the national bank, and they were afterward sold by the pledgees, and the proceeds were credited to the national bank. *Held*, that the national bank was liable to the savings bank for the bonds, although the directors of the national bank were ignorant of the transaction: *Fishkill Sav. Inst. v. Nat. Bank of Fishkill*, 80 N. Y. 162; 36 Am. Rep. 595. Plaintiff, a depositor in a national bank, requested a certificate of deposit, drawing interest, for a portion of his deposit. The teller gave him a certificate purporting to be issued by B. & Co., a private banking firm, and informed him, in presence of the cashier of the bank, that this was the bank's certificate, upon which assurance the plaintiff accepted it. The members of the firm were the managing officers of the bank, but had a separate place of business in the same town. *Held*, that the bank was liable to the plaintiff for the amount of his deposit: *Steckel v. First Nat. Bank of Allentown*, 93 Pa. St. 376; 39 Am. Rep. 758. A lent money to the cashier of a bank for his individual use, as A knew, and innocently took for security a certificate of stock which the cashier represented that he owned, but which, in fact, he had fraudulently obtained from the bank. *Held*, that as A had knowledge that the cashier was acting for himself, he should have made inquiry, and that, not having done so, the loss must fall on him, and not on the bank: *Moores v. Citizens' Bank*, 15 Fed. Rep. 141.

§ 524. **Tellers and Other Officers.**—The functions of the tellers—receiving and paying—are respectively to receive and pay out the moneys of the bank, deposited or drawn out from it, and one cannot discharge, as a rule, the duties of the other.¹ The teller of a bank, by a prior course of dealing, may have implied power to bind the bank by certifying a check.² A receiving teller has no right to receive anything but money.³ A mere clerk acting as cashier in the latter's absence has no authority

¹ *Manhattan Co. v. Lydig*, 4 Johns. 377; 4 Am. Dec. 289; *Farmers' Bank v. Butchers' Bank*, 16 N. Y. 125; 69 Am. Dec. 678; *East River Bank v. Gove*, 57 N. Y. 597; *Terrell v. Bank*, 12 Ala. 502. So a bank is not responsible for false representations made by a teller to induce a transaction not within the scope of the corporate powers of the bank: *Weckler v. First Nat. Bank*, 42 Md. 581; 20 Am. Rep. 95.

² *Farmers' etc. Bank v. Butchers' etc. Bank*, 16 N. Y. 125; 69 Am. Dec. 678; *Meads v. Merchants' Bank*, 25 N. Y. 143; 82 Am. Dec. 331; *Hill v. National Trust Co.*, 108 Pa. St. 1; 56 Am. Rep. 189; *contra*, *Mussey v. Eagle Bank*, 9 Met. 306; compare *Security Bank v. National Bank*, 57 N. Y. 458; 23 Am. Rep. 129.

³ *Clark v. Bank*, 3 Duer, 241.

to transfer any of the notes or securities of the bank, unless such authority has been conferred on him by the directors. The cashier cannot clothe him with any more of his power than is necessary to enable such clerk to carry on the usual and ordinary business of the bank. A clerk intrusted by the cashier with the ordinary business of the bank has power to transmit notes owned by the bank or held by it for collection, and payable in other places or at other banks to its agents for that purpose, and may indorse such paper for the bank when necessary to vest in the collecting agents such title as is required.¹ Usage may confer on a minor officer the authority to do acts not within his legal powers.² A bank whose teller is authorized to certify checks is bound by his certification, although he has no funds, and his authority may be shown by proof of his custom to do so, recognized by the bank.³ If a teller receives money from a depositor for deposit to his credit without a deposit ticket or pass-book, and by mistake credits the money to the wrong person, the bank is liable therefor to the depositor; though such act be contrary to the rules and general custom of the bank.⁴ Notice to an officer of a bank cannot affect the bank, when in regard to a matter not pertaining to his duties. Consequently, notice to some of the officers of a bank for collection of the residence of an indorser does not prevent the bank from excusing want of notice of non-payment at the indorser's residence by the ignorance of the officers charged with the duty of collecting notes.⁵ A bank teller is civilly responsible for any loss to which he contributes by knowingly assisting the cashier in embezzling the funds of the bank.⁶ The usage of banks in respect to the powers and duties of

¹ *Potter v. Bank*, 28 N. Y. 641; 86 Am. Dec. 273.

² *East River Nat. Bank v. Gove*, 57 N. Y. 597.

³ *Hill v. Nation Trust Co.*, 108 Pa. St. 1; 56 Am. Rep. 189.

⁴ *Jackson Ins. Co. v. Cross*, 9 Heisk. 283.

⁵ *Goodloe v. Godley*, 13 Smedes & M. 233; 51 Am. Dec. 159.

⁶ *Hobart v. Dovell*, 38 N. J. Eq. 553.

their officers, so far as such usage is known to the business public, enters into and qualifies the contracts made by such banks through their officers.¹ Where the usage is, that in the absence of the cashier the president signs drafts and checks, the signature of the president under such circumstances binds the bank.² So, though the power is inherent only in the cashier to certify checks, the teller by usage may have such authority.³

ILLUSTRATIONS. — B. drew a post-dated check, payable to his own order, on a bank, in which he had at the time no funds on deposit, and procured the assistant cashier thereof to write an acceptance across the face of the check. B. indorsed the check to G., who procured it to be cashed by P. *Held*, that, although the assistant cashier had no authority to accept the check, the bank was liable thereon to P.: *Pope v. Bank of Albion*, 59 Barb. 226. A check was presented, there were sufficient funds in the bank to meet it, and the book-keeper, at the request of the drawer, charged him with it on his pass-book, leaving still a balance to his credit. In accordance with the regulations of the bank, the check should have passed through other hands and other books before being passed to the credit of the holder. *Held*, that the bank was liable to the holder of the check: *Munn v. Burch*, 25 Ill. 35. A book-keeper in a bank who was also an agent for a dealer with the bank received money from the latter for the purpose of having the same deposited in the bank, and he entered the amount in the ledger, and afterwards in the dealer's bank-book, but the money was not received by the teller, nor entered in his cash-book, and was supposed to be embezzled, with other moneys, by the book-keeper, who absconded. *Held*, that the book-keeper, in making the deposit, was the agent of the depositor, and not of the bank, and that the depositor must answer for the deficit in the deposit: *Manhattan Co. v. Lydig*, 4 Johns. 377; 4 Am. Dec. 280. The teller of a bank upon certifying a check assured the person presenting it that "it was all right in every particular," and thereupon the latter accepted it in payment for property then delivered. The check had been "raised." *Held*, that the bank was

¹ *Lawson on Usages and Customs*, 205.

² *Lawson on Usages and Customs*, 205.

³ *Girard Bank v. Bank*, 39 Pa. St. 92; 80 Am. Dec. 507; *Willems v. Phoenix Bank*, 2 Duer, 121; *Farmers' etc. Bank v. Butchers' etc. Bank*, 16 N. Y.

125; *Meads v. Merchants' Bank*, 25 N. Y. 143; *Clarke Nat. Bank v. Bank*, 52 Barb. 592; *Merchants' Bank v. State Bank*, 10 Wall. 604; *Cook v. State Nat. Bank*, 52 N. Y. 96; 11 Am. Rep. 667; *contra*, *Mussey v. Eagle Bank*, 9 Met. 306.

bound only for the original amount of the check, and that the declarations of the teller would bind the bank only as to the signature: *Security Bank v. Nat. Bank*, 67 N. Y. 458; 23 Am. Rep. 129. Plaintiff, to the knowledge of defendant, a customer, employed in its bank a paying and a receiving teller, the general duty of the latter being to receive moneys paid or deposited. In his absence other officers or clerks acted in his place. Defendant, having overdrawn his account by mistake, received a letter from the paying teller requesting him to call; he went to the bank, and at the request of the paying teller paid him over the counter the amount required to rectify the error; this was not entered on the books of the bank. It did not appear that the receiving teller was in the bank. In an action to recover the amount overdrawn, *held*, that the bank was bound by the payment: *East River Nat. Bank v. Gove*, 57 N. Y. 597.

§ 525. **Deposits—General and Special.**—Deposits in a bank are either general or special. A general deposit is where the amount only is to be returned, on demand, in money. A special deposit is where the identical thing deposited is to be returned to the depositor. *Prima facie* a deposit is general,¹ and is not considered as special, unless it is clearly made so by the depositor.² In the case of a general deposit, the depositor parts with the title of his money, and loans it to the banker;³ and the latter, in consideration of the loan, and the right to use the money for his own profit, agrees to refund the same amount, or any part thereof, on demand. The relation of banker and customer is that of debtor and creditor, and not that of trustee and *cestui que trust*.⁴ Therefore the remedy of the

¹ *Brahm v. Adkins*, 77 Ill. 263. That a deposit is not made for the sole benefit of the depositor, but may in a certain contingency become payable to a third person for whose security the deposit is made, does not deprive it of the character of a deposit: *Bushnell v. Bank*, 74 N. Y. 290.

² *Id.*

³ *Lynch v. First Nat. Bank*, 107 N. Y. 170; 1 Am. St. Rep. 803. Money deposited in bank in the ordinary way is money loaned to the bank, with the superadded obligation that it is to be paid when demanded by check:

Adams v. Schiffer, 11 Col. 15; 7 Am. St. Rep. 202.

⁴ *Foley v. Hill*, 2 H. L. Cas. 28; *Bank of Republic v. Millard*, 10 Wall. 152; *Marine Bank v. Fulton Bank*, 2 Wall. 252; *Knecht v. U. S. Sav. Inst.*, 2 Mo. App. 563; *Graves v. Dudley*, 20 N. Y. 76; *Boyden v. Bank*, 65 N. Y. 13; *Bank v. Jones*, 42 Pa. St. 536; *Allen v. Bank*, 59 N. Y. 12; *Ætna etc. Bank v. Fourth Nat. Bank*, 46 N. Y. 82; 7 Am. Rep. 314; *Buchanan etc. Co. v. Woodman*, 1 Hun, 639; *Com. Bank of Albany v. Hughes*, 17 Wend. 94; *Oddie v. Bank*, 45 N. Y. 735; 6 Am. Rep. 160;

depositor is by action at law against the bank, except under special circumstances.¹ A demand is necessary before suit,² except where excused by circumstances, as where the bank has stopped payment,³ or the depositor has been notified that he will not be paid,⁴ or the bank has rendered an account claiming the deposit as its own.⁵ The deposit in a bank of funds held in a fiduciary capacity in the agent's name as trustee, as "A B, trustee," is notice to the bank of the trust and the fiduciary character of the deposit.⁶ Where a deposit is made of the notes of another bank, which are received as cash, and carried to the general credit of the depositor as cash, the bank cannot afterwards treat it as a special deposit, but make the notes their own, and must bear the loss of them.⁷ Where one having a deposit account in a bank deposits the check of a third person, marking it "For deposit," and the bank gets it certified, the bank may be held as the garnishee of its depositor to the amount of the check.⁸ Money deposited by one on his private account with a banker, and so accepted, cannot afterwards be credited to the account of a company for which the depositor was acting, without his consent.⁹ Nor can a bank transfer money deposited therewith to the payment of the depositor's note without

Corbit v. Bank, 2 Harr. (Del.) 235; 30 Am. Dec. 635; *Coffin v. Anderson*, 4 Blackf. 495; *Marsh v. Bank*, 34 Barb. 296; *Wray v. Ins. Co.*, 34 Ala. 58; *Robinson v. Gardner*, 18 Gratt. 509; *Chapman v. White*, 6 N. Y. 412; 57 Am. Dec. 464; *Downes v. Phoenix Bank*, 6 Hill 297; *Carr v. Bank*, 107 Mass. 45; 9 Am. Rep. 6; *In re Franklin Bank*, 1 Paige, 249; 19 Am. Dec. 413; *Schmidt v. Barker*, 17 La. Am. 261; 87 Am. Dec. 527; *Gumbel v. Abrams*, 20 La. Am. 568; 96 Am. Dec. 426. In *City of St. Louis v. Johnson*, 9 Cent. L. J. 91, it was held that the relation was that of trustee and *cestui que trust* on the facts of that case.

¹ As, for example, the adjustment of a long account in a court of equity: *Foley v. Hill*, 2 H. L. Cas. 28.

² *Adams v. Orange County Bank*,

17 Wend. 514; *Johnson v. Farmers' Bank*, 1 Harr. (Del.) 117, 496; *Brahm v. Adkins*, 77 Ill. 263; *Bank of Mo. v. Benoist*, 10 Mo. 519; *Downes v. Bank*, 6 Hill, 297; *Watson v. Phoenix Bank*, 8 Met. 217; 41 Am. Dec. 500; *Girard Bank v. Bank*, 39 Pa. St. 92; 80 Am. Dec. 507.

³ *Watson v. Phoenix Bank*, 8 Met. 217; 41 Am. Dec. 500.

⁴ *Farmers' etc. Bank v. Planters' Bank*, 10 Gill & J. 422.

⁵ *Bank of Mo. v. Benoist*, 10 Mo. 519.

⁶ *Bundy v. Town of Monticello*, 84 Ind. 119; *Cent. Nat. Bank v. Conn. Mut. Ins. Co.*, 104 U. S. 54.

⁷ *Corbit v. Bank*, 2 Harr. (Del.) 235; 30 Am. Dec. 635.

⁸ *Nat. Commercial Bank v. Miller*, 77 Ala. 168; 54 Am. Rep. 50.

⁹ *Jamison v. Collins*, 11 Phila. 258.

his consent.¹ Where one deposits money in bank, but on the same day, and before the deposit is placed on the books of the bank to his credit, he directs the cashier to change the deposit to the credit of another, which is done, and the money drawn out on the checks of the latter, the former cannot recover from the bank the amount deposited, notwithstanding the custom of the bank in paying out money only on checks.² An agreement by a savings bank to hold the deposit of one party as security for the over-drafts of another is not enforceable by the debtor after the insolvency of the bank.³ A bank which has been designated by a public officer as a depository of public moneys acquires no right to the custody of such moneys from the mere designation. Its right and interest in the deposit commence only from the time when money is actually deposited and accepted.⁴

In the case of a special deposit, the bank is a mere bailee for hire, the title to the deposit remaining in the depositor.⁵ The bank is then liable only for negligence,⁶ and if the deposit be gratuitous, for gross negligence.⁷ A bank is not liable for an omission to protest notes deposited with it for safe-keeping, and not for collection.⁸ A demand on a bank for bonds received by it as a special deposit, according to custom, and a refusal to deliver, with no other explanation than that it had no such bonds, is sufficient proof of loss by negligence to render the bank liable.⁹

¹ *Scott v. Shirk*, 60 Ind. 160.

² *Neff v. Greene County Bank*, 89 Mo. 581.

³ *Van Dyck v. McQuade*, 20 Hun. 262.

⁴ *Lewis v. Park Bank*, 30 How. Pr. 115; 42 N. Y. 463.

⁵ *Bank of Kentucky v. Wistar*, 2 Pet. 318; *Marine Bank v. Fulton Bank*, 2 Wall. 252; *In re Franklin Bank*, 1 Paige, 249; 19 Am. Dec. 413.

⁶ See post, Title Bailments; *Foster v. Essex Bank*, 17 Mass. 479; 9 Am. Dec. 168; *Wylie v. Northampton Bank*, 119 U. S. 361.

⁷ *Hale v. Rawallie*, 8 Kan. 137; *Scott*

v. Nat. Bank, 72 Pa. St. 471; 13 Am. Rep. 711; *First Nat. Bank of Carlisle v. Graham*, 79 Pa. St. 106; 21 Am. Rep. 49; 85 Pa. St. 91; 27 Am. Rep. 623; *Whitney v. Nat. Bank*, 55 Vt. 155; 45 Am. Rep. 598; *Pattison v. Syracuse Nat. Bank*, 80 N. Y. 82; 36 Am. Rep. 582; *First Nat. Bank of Allentown v. Rex*, 89 Pa. St. 308; 33 Am. Rep. 767; *Lloyd v. West Branch Bank*, 15 Pa. St. 172; 53 Am. Dec. 581.

⁸ *N. O. Canal Co. v. Escoffie*, 2 La. Ann. 830.

⁹ *Mansfield Bank v. Zent*, 39 Ohio St. 105.

The transaction between parties creates the relation of principal and broker or agent, where bankers receive money to be loaned out, and agree with the depositor to account to him for the principal and interest, less their charges. In such case, the bankers are only limited in their conduct to the observance of good faith and the exercise of proper care and circumspection. If they in good faith loan the money to a party solvent at the time, they are protected, notwithstanding the party to whom the money is loaned subsequently becomes insolvent.¹

ILLUSTRATIONS.—A bank, at the request of a depositor who had balances due him, paid certain of his debts. It was agreed that the balances, when adjusted, should be applied to repay the amount advanced. Before the balances were adjusted, the bank failed. *Held*, that this was an equitable appropriation of the balances to the bank, and the amount of them should be deducted from his note given to the bank for the amount advanced: *Chase v. Petroleum Bank*, 66 Pa. St. 169. A bank delivered to a savings institution coin to be transmitted to the agent of the bank. The agent received the coin and sold it, and notified the institution that he had deposited the amount to its credit in another bank. The institution credited the bank on account, and sent the agent's letter to the bank. After some days it was discovered that the agent had only deposited his check, which was worthless, as he had failed. *Held*, that neither the institution nor the bank in which the deposit was made was bound by the credit given on the faith of the check and notification: *Dime Savings Inst. v. Allentown Bank*, 65 Pa. St. 116. On Tuesday, the directors of a bank discovered that the cashier had embezzled the funds, but not to such an extent, as they then supposed, as to render the bank insolvent, and it continued business. On Wednesday, complainant, a dealer with the bank, deposited about \$600 in cash and checks, which were credited in his bank-book, and the checks duly forwarded for collection, and credited to the bank by its correspondent. On Thursday the bank suspended through insolvency. *Held*, that complainant's deposit was not entitled to preference in payment over those of other depositors: *Terhune v. Bergen County Bank*, 34 N. J. Eq. 367. Deposits were made by a clerk in the employ of a firm of shipping brokers, of moneys received in the ordinary course of business of such firm on account of vessels consigned to them, for freights collected, the deposits being made

¹ Wyckoff v. Irvine, 6 Minn. 496; 80 Am. Dec. 461.

in the name of the clerk, on account of the financial embarrassments of said firm, for safe-keeping, and in order that they might be paid over to the parties to whom they actually belonged; and such funds were applied by the bank, the defendant, in payment of a matured indebtedness to it by the firm, upon the claim that the money was really deposited for the benefit of the firm and became liable for their debt. *Held*, that the firm had no title to the moneys, and the defendants' demand was not the subject of set-off or recoupment against such moneys, they never having lost their original character, or been mingled with moneys of the firm: *Falkland v. St. Nicholas Bank*, 84 N. Y. 145. Money paid by a savings bank to the M. bank in pursuance of an agreement to deposit with the M. bank one fourth of all moneys received, the M. bank to pay interest on the daily balance at four per cent per annum, and at the end of three years pay over to the savings bank all money belonging to it, and also pay at sight any checks or drafts drawn upon it: *Held*, to be a "deposit," and entitled to priority over other claims: *In re Patterson*, 18 Hun, 221. A bank, as security for a person who had lent his name as maker of an accommodation note, deposited a sealed package of the bills of the bank in its vaults, with a memorandum thereon that the package was to secure the drawer of the note. *Held*, that the maker of the note acquired no lien upon the bills: *Davenport v. City Bank of Buffalo*, 9 Paige, 12.

§ 526. Payment of Deposits.—A banker is not bound to pay money held for one on deposit, upon an oral order;¹ it is entitled to a written evidence of the order for money upon payment thereof.² A bank is not chargeable with interest on sums deposited to the credit of customers to be drawn against by check, until payment be demanded, unless upon special contract.³ One who requests a bank to remit to him by draft the money which he has on deposit therein, and which, by the rules of the bank, is payable only at its counter, assumes the risk of transmission of the draft in the usual way by mail; and the mailing of such draft, properly addressed, discharges the debt of the bank to him.⁴ The money on deposit to

¹ *McEwen v. Davis*, 39 Ind. 109.

² *McEwen v. Davis*, 39 Ind. 109.

³ *Parkersburg Nat. Bank v. Als*, 5 W. Va. 50.

⁴ *Twig v. Second Ward Savings Bank*, 55 Wis. 364; 42 Am. Rep. 719.

the credit of a depositor is presumed to belong to the depositor,¹ and the bank is justified in paying over the money on the checks of the depositor, until notice of the claims of a third person upon the fund deposited,² or notwithstanding the depositor has made an assignment for the benefit of creditors, if notice of such assignment is withheld from the bank.³ But a bank which receives a deposit to apply to a designated debt cannot escape liability by applying it to another debt.⁴ Money received from A to hold it subject to his order may not be paid to one to whom A, without the privity of the bankers, and without an order, has promised it.⁵ The bank cannot refuse to pay the depositor on the ground that the money belongs to a third party.⁶ A bank cannot refuse to pay a

¹ *Arnold v. Sav. Bank*, 71 Pa. St. 213.

² *McEwen v. Davis*, 39 Ind. 109; *First National Bank v. Bache*, 71 Pa. St. 213; *Farmers' etc. Bank v. King*, 57 Pa. St. 202; 98 Am. Dec. 215; *Com. Bank v. Jones*, 18 Tex. 811; *Dacy v. Bank*, 2 Hall, 550; *Swartwout v. Bank*, 5 Denio, 555; *School District v. Bank*, 102 Mass. 174.

³ *Griffin v. Rice*, 1 Hilt. 184.

⁴ *Judy v. Farmers' and Traders' Bank*, 81 Mo. 404.

⁵ *Coffin v. Henshaw*, 10 Ind. 277.

⁶ *First National Bank v. Mason*, 95 Pa. St. 113; 40 Am. Rep. 632; the court saying: "It is well settled that money deposited in a bank to the credit of A may be shown to be the property of B. It may be reached by attachment on the part of the judgment creditors of B, or its payment by the bank to A may be stopped by a proper notice on the part of B that the money belongs to him. The credit on the books of the bank is but *prima facie* evidence of ownership: *Harriaburg Bank v. Tyler*, 3 Watts & S. 373; *Frazier v. Erie Bank*, 8 Watts & S. 18; *Jackson v. Bank*, 10 Pa. St. 61; *Bank of Northern Liberties v. Jones*, 42 Pa. St. 541; *Stair v. York National Bank*, 55 Pa. St. 368; *Arnold v. Macungie Saving Bank*, 71 Pa. St. 290. These were cases, however, in which the true owner set up a claim to the fund. We have here a very different

question. The bank, the depositary, sets up an adverse title to defeat the suit of its own depositor. The bank held its claim against Thomas and Mason when the plaintiff made his deposits, and they knew, at least they allege they knew, when the deposits were made that the money so deposited in plaintiff's name belonged to said firm; yet, under these circumstances, and with this knowledge, they permitted the plaintiff to make the deposit in his own name. Having received it as the money of plaintiff, and given him credit therefor, the bank is estopped, in the absence of any notice from or claim by the real owner from disputing plaintiff's title. Having received the money as the money of the plaintiff, it is bound to pay it to him, or upon his order. Such a contract is implied from the fact of the deposit. . . . It is clearly against public policy to permit a bank that has received money from a depositor, credited him therewith upon its books, and thereby entered into an implied contract to honor his check, to allege that the money deposited belonged to some one else. This may be done by an attaching creditor, or by the true owner of the fund, but the bank is estopped by its own act. A departure from this rule might lead to novel results and embarrass commercial transactions."

wife money deposited in her name, on the ground that it belonged to her husband rather than to her.¹ In the absence of any circumstances to charge a bank with notice that a depositor is a married woman, they have a right to open an account with her as a *feme sole*, and to pay checks drawn by her upon deposits made by herself, though they are in fact her husband's money.² A bank has no right, without an order from a depositor, to apply money on deposit in payment of a note payable at the bank.³ A bank holding funds of a depositor cannot retain the same against the check-holder under claim of an equitable lien for a debt by the drawer not yet matured.⁴ But a bank may apply a deposit in payment of a matured note held by it against the depositor.⁵ It has the right to apply to the payment of a depositor's note, not only all funds in bank when the note matures, but all afterwards received, as well as proceeds of commercial paper owned by him and left with the bank for collection.⁶ When, at the maturity of a note held by a bank, the maker's deposit in the bank is insufficient to pay the note, which is protested for non-payment, the bank is not bound, for protection of the indorser, to apply the maker's subsequent deposits to its payment, although they are sufficient.⁷

A bank may interplead conflicting claimants to funds held by it on deposit; as where a deposit is made in the name of public officers whose title is afterward questioned by other claimants of the office.⁸ And it may demand indemnity, it seems, on paying over a deposit to which

¹ *German Bank v. Himstedt*, 42 Ark. 62.

² *Dacy v. New York Chemical Mfg. Co.*, 2 Hall, 589.

³ *Ridgely Bank v. Patton*, 109 Ill. 479.

⁴ *Zelle v. German Savings Inst.*, 4 Mo. App. 401; *Jordan v. Shoe and Leather Bank*, 74 N. Y. 467.

⁵ *Home Bank v. Newton*, 8 Ill. App. 563.

⁶ *Muench v. Valley Bank*, 11 Mo. App. 144.

⁷ *People's Bank v. Legrand*, 103 Pa. St. 309; 49 Am. Rep. 126.

⁸ *German Exchange Bank v. Commissioners of Excise*, 6 Abb. N. C. 94; 57 How. Pr. 187.

there are conflicting claims.¹ If a deposit is made in the name of a firm, and the bank pays it out on the individual check of one of the firm in his own name only, it can only justify by showing that the money thus drawn was applied to the use of the firm.² If one deposits funds which are current at the time, he may insist on payment in current funds, although the funds deposited have in the mean time depreciated,³ or the bank whose bills he has deposited stops payment subsequently.⁴ But if he deposits bank bills as depreciated paper, he cannot draw for par funds.⁵ So though a deposit is made in gold it may be paid in notes, if legal tender,⁶ unless there is a special agreement that it is to be paid in gold.⁷ Where a bank discounts a customer's note in case of the insolvency of the borrower before actual payment of the money, an equitable right, analogous to the doctrine of stoppage *in transitu* before the actual delivery of goods, may be exercised by the banker.⁸ A bank, on establishing and explaining the mistake, may recover back from a depositor an excess drawn out through an erroneous double entry on the ledger copied into the depositor's bank-book as two deposits.⁹ The rule of a clearing-house association that a bad check is to be returned by the bank receiving it to the bank from which it was received, and in no case to be held after one o'clock, simply fixes a time at

¹ *Stair v. Bank*, 55 Pa. St. 364; 93 Am. Dec. 759. A bank acknowledges that money represented by certified check remains on deposit to the credit of the holder where it pays a duplicate check to the drawer, taking his bond of indemnity against the check, which the drawer claimed to have lost: *Girard Bank v. Bank*, 39 Pa. St. 92; 80 Am. Dec. 507.

² *Coote v. Bank*, 3 Cranch C. C. 50.

³ *Willets v. Paine*, 43 Ill. 432; *Marine Bank v. Chandler*, 27 Ill. 525; 81 Am. Dec. 249; *Marine Bank v. Birney*, 28 Ill. 90; *Bank v. Wister*, 2 Pet. 318; *Gumbel v. Abrams*, 20 La. Ann. 568; 96 Am. Dec. 426. A contrary custom

is not binding: *Lawson on Usages and Customs*, 210.

⁴ *Corbit v. Bank*, 2 Harr. (Del.) 235; 30 Am. Dec. 635.

⁵ *Willets v. Paine*, 43 Ill. 432; *Foster v. Bank*, 21 La. Ann. 338; *Debnay v. Bank*, 3 S. C. 124.

⁶ *Sanford v. Hayes*, 52 Pa. St. 28; *Gumbel v. Abrams*, 20 La. Ann. 568; 96 Am. Dec. 426; *Thompson v. Riggs*, 5 Wall. 663.

⁷ *Kupfer v. Bank*, 34 Ill. 328; 85 Am. Dec. 309.

⁸ *Dougherty v. Central Nat. Bank*, 93 Pa. St. 227; 39 Am. Rep. 750.

⁹ *McLean County Bank v. Mitchell*, 88 Ill. 52.

which payment of the check is to be considered complete; and a failure to return such a check by that time does not work a forfeiture of the money paid on it.¹ A publication of unclaimed deposits remaining in a bank, made in pursuance of the statute, is an acknowledgment of indebtedness, from which a new promise will be implied to save the statute of limitations. The fact that such statement is required by law does not alter the case, for it might be so qualified as to repel the inference of a promise.²

ILLUSTRATIONS. — On March 28, 1877, a bank agreed by letter with its depositor A to discount a new note in renewal of one already discounted and maturing on the following April 2d, and received the new note and collateral, with the amount of the discount, before that date. On April 2d, after business hours, the bank returned the original note. On April 3d, the bank learned that A had that day confessed insolvency, and the bank thereupon charged A's account with the amount of the renewal note, tendering back the note and collaterals, and the amount of the discount. In a suit brought before the date of the maturity of the renewal note by A, for the use of B and C, holders of checks drawn by A on April 2d, but not presented for payment until after notice of the insolvency had been received by the bank, and also assignees by assignment under seal of the whole fund on deposit, *held*, that the plaintiffs could not recover: *Dougherty v. Cent. Nat. Bank*, 93 Pa. St. 227; 39 Am. Rep. 750. A bank made an assignment for the benefit of creditors. At the time it held the defendant's note which it had discounted, and which was not due. It was also indebted to defendant for deposits in a sum greater than the note. In an action on the note after its maturity by the assignee, *held*, that defendant could off-set the indebtedness to him: *Jordan v. Sharlock*, 84 Pa. St. 366; 24 Am. Rep. 198. A promissory note upon which the defendant was surety was given by a depositor who kept an ordinary account with the plaintiff bank, and who was treasurer of the town of E, to the plaintiff, and plaintiff gave said depositor for said note a draft to be used for the payment of a tax due from the town. Said note, and the proceeds of it, were not made a part of said depositor's account with the bank, and the bank regarded said note as an official or town matter. When said note fell due, there stood to the credit of said de-

¹ *Merchants' Nat. Bank v. Bank*, 101 Mass. 281; 100 Am. Dec. 120.

² *Adams v. Orange County Bank*, 17 Wend. 514.

positor, as his balance account, a sum less than the amount of said note. At and ever since the maturity of said note, the plaintiff held another note for a larger amount, made by said depositor, and upon the maturity of the latter note, the president of the bank instructed the cashier to apply said balance upon the latter note. Thereafter, the defendant brought to the bank a check of said depositor, made after the maturity of said last-mentioned note, and a sum of money, and tendered the same in payment of said first-mentioned note, but the cashier declined to receive the same because he had been directed to apply said balance on said other note. In a suit against said surety on said first-mentioned note, *held*, that he was not entitled to have said balance of account applied to the satisfaction of the note in suit: *Nat. Mahaiwe Bank v. Peck*, 127 Mass. 298; 34 Am. Rep. 367. On a deposit of its own bills in the Kentucky Bank, the cashier gave a certificate that there had been deposited to the credit of W. seven thousand dollars, subject to his order on presentation of the certificate. The bills deposited were, at the time of the deposit, and also at the time when payment was demanded, passing at fifty per cent discount. On W.'s presenting the certificate, the cashier offered payment in the bills of the bank, which W. refused. *Held*, that W. was entitled to gold or silver, the certificate expressing a general, and not a specific, deposit: *Bank of Kentucky v. Wister*, 2 Pet. 324. Plaintiff deposited moneys in the Bank of Louisiana. The bank and all its assets were afterwards seized and taken possession of by order of the commanding general of the United States army, and all the assets, including the deposits, were turned over by the directors of the bank to the quartermaster of the department. Plaintiff, a depositor, brought suit against the bank for the amount of the deposits still to his credit. The bank set up in defense that such deposits had been seized and taken possession of by order of the commanding general, and that the bank was not again liable for their payment. *Held*, that the bank having paid out all such deposits under an authority they had no right to question nor power to resist, they were no longer liable to pay them to the depositors, and that obedience to the military order was full protection to the bank: *Mandeville v. Bank of Louisiana*, 19 La. Ann. 392; 92 Am. Dec. 541. A drew a draft on B, and deposited it in a bank, which credited him with it as cash on its books, but did not enter it on his pass-book until after it had failed, and then without his knowledge. The draft was collected by the bank's agent after its failure. *Held*, that A could not recover the amount from the receiver of the bank: *St. Louis and San Francisco R. R. Co. v. Johnston*, 23 Blatchf. 489; 27 Fed. Rep. 243. A gave a note to a bank, payable in sixty days, which was discounted, and he

died before it fell due, having a larger sum deposited in the bank than the amount of the note. *Held*, that the bank might, in equity, retain the amount of the note, though A might owe others debts of a superior dignity: *Ford v. Thornton*, 3 Leigh, 695. Plaintiff, being about to leave home for a short time, gave his clerk a power of attorney to draw checks on a bank for fifteen days, and deposited the power of attorney with the bank. Plaintiff returned, but the clerk continued to draw checks on the bank for several months. Meanwhile the bank-book of plaintiff had been several times written up, but as the clerk was plaintiff's cashier, the fact that he had been drawing checks after the power of attorney expired had not been discovered by plaintiff. Certain amounts so drawn were used by the clerk for his own purposes. *Held*, that the bank was liable for such amounts. The bank was guilty of negligence in paying checks of the clerk drawn after the expiration of the power of attorney, and could not be excused because plaintiff had failed to examine the returned checks and bank-book: *Manufacturers' Nat. Bank v. Barnes*, 65 Ill. 69; 16 Am. Rep. 576. Plaintiffs, having received the check of a third party payable to their order, indorsed it to the order of the cashier of defendant's bank, and, inclosing it in an envelope, sent it to the bank for deposit by a messenger whom they knew to be untrustworthy. The messenger removed the check from the envelope and presented it to the bank for payment, stating that plaintiff desired the money. The bank gave to the messenger the amount of the check, and he absconded with it. The payment was not in the usual course of business. *Held*, that plaintiffs could recover of the defendants the amount of the check: *Bristol Knife Co. v. First Nat. Bank*, 41 Conn. 421; 19 Am. Rep. 517. A bank received money from the maker of a note, originally given to the bank, before it was due, to pay it to the holder and return the note, but appropriated the money and failed to pay the note. *Held*, that the maker could reclaim the money from the bank's assignee in trust for creditors: *Peak v. Ellicott*, 30 Kan. 156; 46 Am. Rep. 90. After a promissory note held by a bank had been dishonored, and the indorser duly notified, the maker deposited in the bank, on his current account, a sum of money sufficient to pay the note. *Held*, that the bank was not bound to apply this money to the payment of the note, and that the indorser was not discharged: *National Bank of Newburgh v. Smith*, 66 N. Y. 271; 23 Am. Rep. 48.

§ 527. **Trust Funds.**—Though the deposit establishes the relation of debtor and creditor between the parties, yet it does not change the character of the money depos-

ited. If the money was trust money, the deposit remains subject to the trust.¹ In the absence of any notice that money deposited by a trustee in a bank is trust funds, the bank may apply it as his private property.² A bank receiving deposits from an agent becomes his debtor, and may, in the absence of interference by his principal, to whom the money belongs, extinguish its liability by paying the debt in answer to his checks; but when the principal asserts his right to the money before its repayment, gives notice of his ownership to the bank, and of his unwillingness that the money shall be paid to the agent, the agent's right to reclaim it ceases.³ Where a broker holding for collection a note belonging to the plaintiff received in payment a check on a bank, which he deposited, and then had the fund transferred to a third bank, the court allowed the owner of the note to follow it and reclaim the proceeds.⁴ And if the trustee deposits trust money in his own name with his individual money, the former remains, in view of equity, the property of the *cestui que trust*, and if it can be traced into the bank while

¹ Third Nat. Bank v. Stillwater Gas Co., 36 Minn. 75, the court saying: "So long as the trust property can be traced and followed into other property into which it has been converted, that remains subject to the trust. The product or substitute has the nature of the original imparted to it. The depositing of trust money in a bank, although it creates the relation of debtor and creditor between the bank and the depositor, does not change its character or relieve the deposit from the trust. It is not the identity of the form, but the substantial identity of the fund itself, which is the important thing. In support of these propositions, and as illustrating the extent to which courts of equity have carried this principle, see Taylor v. Plumer, 3 Maule & S. 562; Pennell v. Deffell, 4 De Gex, M. & G. 372-387; Frith v. Cartland, 2 Hem. & M. 417; Knatchbull v. Hal-

lett, L. R. 13 Ch. Div. 696; Overseers of Poor v. Bank, 2 Gratt. 544; 44 Am. Dec. 399; Van Alen v. American Nat. Bank, 52 N. Y. 1; People v. City Bank, 96 N. Y. 32; Cragie v. Hadley, 99 N. Y. 131; 52 Am. Rep. 9; Whitley v. Foy, 6 Jones Eq. 34; 78 Am. Dec. 236; Farmers' Bank v. King, 57 Pa. St. 202; 98 Am. Dec. 215; Peak v. Ellicot, 30 Kan. 156; 46 Am. Rep. 90; National Bank v. Insurance Co., 104 U. S. 54; McLeod v. Evans, 66 Wis. 401; 57 Am. Rep. 287; United States v. Waterborough, Daves, 154; Walker v. Manhattan Bank, 25 Fed. Rep. 247."

² School District v. First Nat. Bank, 102 Mass. 174.

³ Farmers' and Mechanics' National Bank v. King, 57 Pa. St. 202; 98 Am. Dec. 215.

⁴ Schuler v. Laclede Bank, 27 Fed. Rep. 424.

it remains there, the owner can reclaim it.¹ If a bank holding a trust fund colludes with the trustee in a misapplication of it, the bank is liable to the *cestui que trust* for any loss thereby incurred.² Where a deposit is made in the name of a person, the word "trustee" being added, this is notice to the bank that the funds are not the depositor's.³ So, where the words "executor,"⁴ or "general agent,"⁵ or "agent,"⁶ are used. An account in the name of "A, county treasurer," is not by itself notice that the funds belong to the county.⁷ So the addition of the word "clerk" to the name of a general depositor does not make the deposit a special one, nor change the bank's liability.⁸ A bank keeping an account with a public officer in his own name, with his official addition, is liable to him individually, unless they show that by the account so kept they are liable to the government.⁹ If a depositor has two accounts, one his individual account and the other as trustee or agent, and he draw a check on the trust fund in settlement to balance the private fund, the bank, if it transfers the amount to such private fund, is liable to the *cestui que trust* or principal for the amount transferred.¹⁰ Money belonging to different persons may be included in one agency bank account, though there is no mark to determine that ownership, and the officers of the bank where it was attached as the individual property of the agent have no other knowledge of the ownership than the addition of the word "agent" to

¹ Van Alen v. Bank, 52 N. Y. 1; Disbrow v. Mills, 2 Hun, 132; Overseers v. Bank, 2 Gratt. 544; 44 Am. Dec. 399.

² Bank of Greensborough v. Clapp, 76 N. C. 482.

³ Shaw v. Spencer, 100 Mass. 382; 1 Am. Rep. 115; 97 Am. Dec. 107. Money deposited in the name of A, as trustee, may not be drawn out on a check signed by his individual name only: Ihl v. St. Joseph Bank, 26 Mo. App. 129.

⁴ Bailey v. Finch, L. R. 7 Q. B. 34.

⁵ Central Nat. Bank v. Conn. Mut. Ins. Co., 104 U. S. 54.

⁶ Baker v. Nat. Ex. Bank, 100 N. Y. 31; 53 Am. Rep. 150.

⁷ Eyerma v. Second Bank, 84 Mo. 408; 13 Mo. App. 289.

⁸ McLain v. Wallace, 103 Ind. 562.

⁹ Swartwout v. Mechanics' Bank, 5 Denio, 555.

¹⁰ Farnell v. Hurley, 2 Coll. C. C. 241.

the defendant's name in the account.¹ Where a bank hopelessly insolvent to the knowledge of its officers receives a deposit, and afterwards suspends business, it becomes a trustee for the depositor. The relation of debtor and creditor, as in ordinary cases, is not established, and the customer may recover the deposit from the bank as trust money in its hands.² In a New York case, a bank received from a depositor checks for the payment of two notes formerly discounted by them, and then charged such to his general account, and soon after failed. The bank, in fact, did not have the notes, but had sold them to a third party, and received the proceeds before these checks were drawn. Of these facts the depositor was ignorant. The depositor recovered from the receiver the full amount of his deposit, on the ground that the bank was a trustee in its relation to the checks, and the proceeds of the notes belonged in equity to the depositor. The specific fund could not be identified, but the general assets in the receiver's hands were impressed with a trust.³ So where a banker in failing circumstances, of which he knew, received for collection a draft on New York, but sent it to Chicago, where the amount was credited to his account, and he at once drew against the account to the full amount of the draft (leaving no further sum there), and then failed and made an assignment, having only one third of the amount of the draft on deposit in his own name at the time of the failure, it was held that the owner of the draft was entitled to have a trust impressed upon the amount in the debtor's bank.⁴

ILLUSTRATIONS.—A clerk of the court deposited large sums of money in a bank, in the usual course of business, and the amount of the deposit was entered in the bank-books under his

¹ *Jones v. Bank of Northern Liberties*, 44 Pa. St. 253.

³ *People v. City Bank of Rochester*, 96 N. Y. 32.

² *Cragie v. Hadley*, 99 N. Y. 131; 52 Am. Rep. 9. But see *Terhune v. Bank*, 34 N. J. Eq. 367.

⁴ *McLeod v. Evans*, 66 Wis. 401; 57 Am. Rep. 237.

name, with the word "clerk" added thereto. The bank having failed, he sought to recover the amount in the bank at the time of its failure, on the ground that he was merely a trustee, the money having come to his hands by virtue of his office. *Held*, that he could not recover: *McLean v. Wallace*, 103 Ind. 562, the court saying: "The rule that a trustee may follow trust property as long as it can be traced is not applicable to such a case. The addition of the word 'clerk' to the name of a general depositor does not make the deposit a special one, nor does it change the liability of the bank." And see *Otis v. Gross*, 96 Ill. 612; 36 Am. Rep. 157; *Fletcher v. Sharpe*, 108 Ind. 276. A bank opened an account with J. C. W., "trustee," and received money on deposit with notice of its origin, which he had received from the sale of bonds of a town, of which he was treasurer. The bank sought to apply such money to the satisfaction of a debt of the trustee to it. *Held*, that it could not thus take this fund to satisfy his individual debt, and that the use of the word "trustee" was of itself notice sufficient of the character in which it was held: *Bundy v. Monticello*, 84 Ind. 119. A village treasurer borrowed money of a bank on his own note, with his own securities, saying he was securing the loan for the village, and to anticipate the collection of taxes. The money was deposited in the bank to his credit as treasurer, and most of it was paid out upon village warrants. The treasurer, after the tax money came in, drew his check upon the fund to pay the note and redeem the collateral. *Held*, that as against the village the payment was valid, although the treasurer proved a defaulter: *Fifth Nat. Bank v. Hyde Park*, 101 Ill. 595; 40 Am. Rep. 218. A deposited a check with a bank, drawn by a third person, for collection and credit to his account. In accordance with an agreement between the parties, the bank gave A credit immediately for the check, and he at once drew against it. The bank sent the check to the defendant, its corresponding bank, who charged it to the drawer, and credited the first bank. The latter in the mean time had failed and made an assignment, but the defendant did not know it. *Held*, that A could not recover on the check from the defendant: *Ayres v. Bank*, 79 Mo. 421; 49 Am. Rep. 235. A fraudulently obtained a loan of a bank, and left it there subject to his check. Afterwards he drew it out and placed it in the possession of B, his agent, by causing it to be deposited in another bank to the credit of his agent. Subsequently, C obtained the money of B by false and fraudulent statements, and shortly afterwards A died insolvent. *Held*, that the first bank which made the loan, having traced the loan to the place where it was deposited, could recover it: *Third National Bank v. Stillwater Gas Co.*, 36 Minn. 75. A bank in Missouri undertook to lend money on real estate there, for the plaintiff,

who resided in New York. The plaintiff sent the bank a check on a New York bank, the sum to be lent, payable to it, to be paid to the borrower when the terms of the loan as to delivery of securities were performed. The bank credited the check to the plaintiff on investment account, and sent it to its correspondent in New York, by whom it was collected and credited to the sender. Meantime the bank led the plaintiff to believe that the loan had been perfected, and subsequently made an assignment for the benefit of its creditors. *Held*, that the relation was that of trustee and *cestui que trust*, and not that of depositor and depositary; and that the bank was liable for wrongfully mixing the proceeds of the draft with its own money: *Harrison v. Smith*, 83 Mo. 210; 53 Am. Rep. 571. A lady intrusted her solicitor with sums of money for investment. He invested the money in bonds, gave her receipts for the bonds, describing them, and stating that he held them for her in safe custody, and paid her the dividends. Afterwards he sold the bonds without her authority, paid the proceeds of sale into his private account at a bank, where it was entered that the sum was derived from the sale of the bonds, describing them, though not stating who was the owner. He died insolvent, leaving a balance at the bank, which included such proceeds of the sale. *Held*, that although the solicitor was not a trustee for the lady, he stood in a fiduciary relation to her; that the proceeds of sale remaining in the bank were clearly ear-marked, and that she was entitled to follow them: *In re Hallett's Estate*, 41 L. T., N. S., 186; 13 Ch. Div. 696. B. employed S. to take timber from B.'s land, B. to be allowed one cent per foot, and have a lien on the timber for the payment. S. took the timber, sold it, and received a note for it in his own name, which was collected by a bank. B. gave the bank notice that the proceeds were his, and not to pay to S., and indemnified it; but the bank paid to S. *Held*, that B. could recover the amount with interest: *First Nat. Bank v. Bache*, 71 Pa. St. 213; compare *Arnold v. Macungie Sav. Bank*, 71 Pa. St. 287. A deposited money with a banker, who converted it into bonds which he delivered to B, in due course of business with the latter. *Held*, that A could not follow the bonds into B's hands. His remedy was against the banker: *Baker v. Kennedy*, 53 Tex. 200. Money was consigned by a principal to his agent, but without instructions as to its disposal, and the agent took the money to a bank, and with the knowledge of the officers of the bank that the money belonged to the principal and had been so consigned, and by their advice to deposit it to await instructions from his principal, the money was deposited in the agent's name. *Held*, that the bank was liable for a conversion, and became directly responsible to the principal, and not merely to the agent: *Commercial Bank v.*

Jones, 18 Tex. 811. A deposited in his own name B's money in a bank, giving B a check, which B indorsed over to C. Before the presentation of the check to the bank, proceedings *de lunatico inquirendo* were instituted against B, and the bank was enjoined from paying over the money. Pending the proceedings the check was presented and payment refused. B was adjudged to be of unsound mind, and to have been so for a period antedating the deposit, and the bank, in compliance with an order of court, paid over the amount of the deposit to B's committee. *Held*, that such payment absolved the bank from liability: *Viets v. Union Bank*, 101 N. Y. 563; 54 Am. Rep. 743. An insolvent commission merchant, to protect his principal, deposited the proceeds of sales made for him in his own name as agent, the bank knowing the facts. *Held*, that the bank could not set off a debt due it from the agent, even with the agent's consent, although the agent had sometimes used his principal's money and deposited his own in its place, and although the proceeds of sales of other principals were deposited in the same account: *Baker v. New York Nat. Exchange Bank*, 100 N. Y. 31; 53 Am. Rep. 150.

§ 528. **Banks-books.**—The bank-book is the property of the depositor, which he presents with his deposit, and in which is entered the date and amount by the teller or proper officer. Such entry is *prima facie* evidence that the bank received the amount, and casts on it the burden of showing that the entry is a mistake.¹ A depositor who has lost his book cannot recover his deposit from the bank upon evidence of such loss, without offering indemnity.² A depositor in a savings bank may maintain an action to recover the amount of his deposit, although, upon production of the deposit-book, the bank has paid the amount due to one who has been appointed as his administrator under the erroneous belief that he was dead, after he had been absent for more than seven years without being heard from.³ Payment by a savings bank to the administrator of a depositor whose account was "in trust

¹ *Asher v. Park Bank*, 7 Alb. L. J. 43; *Shaw v. Picton*, 4 Barn. & C. 715; *Shaw v. Dartnall*, 6 Barn. & C. 57; *Union Bank v. Knapp*, 3 Pick. 96; 15 Am. Dec. 181.

² *Heath v. Bank*, 46 N. H. 78; 88 Am. Dec. 194.

³ *Jochumsen v. Bank*, 3 Allen, 87.

for C. B.," upon production of the letters of administration and the pass-book, and in the absence of any notice from the beneficiary, the production of the book by the rule of the bank entitling the bearer to payment is valid and effectual to discharge the bank.¹ A depositor is bound by a by-law or a rule of a savings bank that in case of loss or theft of the deposit-book he should give immediate notice to the bank, and that the bank would not be responsible for payment to a wrong person, in absence of such notice.² But a stipulation between a savings bank and a depositor that the deposit may be paid to any one presenting his book does not excuse the bank from the exercise of reasonable care.³ A depositor is not bound by an erroneous entry.⁴ If he can prove a mistake in the entry, there is a remedy, as in ordinary cases of mistake;⁵ and this notwithstanding a by-law or rule of the bank requiring payments made and received to be examined at the time.⁶ A dispute between the depositor and bank as to the correctness of the entry raises a question of fact for the jury.⁷ A depositor owes no duty to a bank which requires him to examine his bank-book or vouchers, with a view to the detection of forgeries of his name.⁸ He has a right to assume that the bank, before paying his checks, will ascertain the genuineness of his signature.⁹ But a depositor who, by neglect to examine his pass-book, periodically sent back balanced from the bank with the canceled paid checks as vouchers, puts

¹ *Boone v. Bank*, 84 N. Y. 83; 38 Am. Rep. 498.

² *Donlan v. Prov. Inst.*, 127 Mass. 183; 34 Am. Rep. 358; *Burrill v. Dollar Savings Bank*, 92 Pa. St. 134; 37 Am. Rep. 669; *Eaves v. People's Savings Bank*, 27 Conn. 229; 71 Am. Dec. 59.

³ *Kimball v. Norton*, 59 N. H. 1; 47 Am. Rep. 171.

⁴ *Mechanics' Bank v. Smith*, 19 Johns. 115.

⁵ *Mechanics' Bank v. Smith*, 19 Johns. 115.

⁶ *Mechanics' Bank v. Smith*, 19 Johns. 115.

⁷ *Snead v. Williams*, 9 L. T., N. S., 115.

⁸ *Weisser v. Denison*, 10 N. Y. 68; 61 Am. Dec. 731; *Frank v. Chemical Nat. Bank*, 37 N. Y. Super. Ct. 26; 45 N. Y. Super. Ct. 452; *Welsh v. Bank*, 73 N. Y. 424; 29 Am. Rep. 175.

⁹ *Welsh v. German American Bank*, 73 N. Y. 424; 29 Am. Rep. 175; *Salt Springs Bank v. Syracuse Sav. Inst.*, 62 Barb. 101.

it in the power of his clerk to continue a practice of raising checks after their signature, and before their presentation by such clerk, must bear the loss resulting. He cannot charge it on the bank. And whether he exercises reasonable care in the premises is a question of fact on the circumstances of each case.¹ Where a check is drawn upon a particular bank, in favor of a person who has an account at such bank, is presented to the teller of such bank, who receives it, and enters, in the pass-book of the person presenting it, a credit for the amount of it, and in the course of the day the bank ascertains that there are no funds in its hands to the credit of the drawer of the check, and thereupon, at the close of banking hours, returns the check to the person who presented it, the bank will not be liable to such person for the amount of the check. In the absence of an express agreement to the contrary, the bank will be deemed to have received the check for collection, and not as cash, and is entitled to a reasonable time, after receiving the check, to ascertain the state of the accounts of the drawer. But it seems that it would be otherwise where the drawer subsequently during the day deposits funds sufficient to meet the check, which the bank applies to its own account, or in payment of other checks.² If a depositor's bank-book accompanied the deposit, and an entry was then made by a clerk authorized to make it, in the absence of any fraud or collusion between the clerk and the depositor, it is an original entry, and conclusive on the bank; if, however, the book is sent to be written up afterwards, it is not an original entry, and may be examined into.³ A by-law of a savings bank, assented to by its depositors, that the pass-book of each depositor containing his account shall be transferable to order, does not render such pass-book a

¹ *Leather Manufacturers' Bank v. Oddie v. Nat. Bank*, 45 N. Y. 735; 6 Morgan, 117 U. S. 98. Am. Rep. 160.

² *Nat. Gold Bank v. McDonald*, 51 Cal. 64; 21 Am. Rep. 697. But see ³ *Hepburn v. Bank*, 2 La. Ann. 1007; 46 Am. Dec. 564.

negotiable instrument; and even if it did, it would not be so as to third parties.¹

ILLUSTRATIONS.—The by-laws of a savings bank provided that in order to draw out money the pass-book must be presented at the bank, and that absent depositors could withdraw their deposits on their order or check properly witnessed. *Held*, that the bank was liable to the depositor for money paid on forged checks to one who had possession of the deposit-book by the consent of the depositor, which checks were not witnessed as required by the by-laws: *People's Savings Bank v. Cupps*, 91 Pa. St. 315. A confidential clerk, having charge of his employer's check-book and bank-book, and whose duty it was to enter all checks on one side of the bank-book, the bank entering all deposits on the other, forged fourteen checks of his employer, at different times; the bank paid them, and he entered them in the bank-book. The bank returned such checks with the book, striking the balances after payment of the first five, and again after the payment of the other nine. The employer did not discover the fraud until after the payment of all the forged checks. In an action by him against the bank to recover this amount, *held*, that he was not absolutely estopped by apparent acquiescence in the account thus stated in the bank-book, and could recover, unless he had been guilty of negligence in discovering the fraud, and unless the bank, in paying the later forged checks, had relied on his apparent acquiescence in the payment of the earlier one: *Hardy v. Chesapeake Bank*, 51 Md. 562; 34 Am. Rep. 325. The plaintiffs' confidential clerk forged their checks, and obtained payment on them from the defendant, their bank. The forged checks were returned by the bank to the plaintiffs, with their pass-book, when their account was balanced, but the clerk, in assisting them to examine the account, fraudulently prevented the discovery of the forgeries. *Held*, that the plaintiffs were not estopped from disputing the account and recovering the balance, deducting the forged checks: *Frank v. Chemical Nat. Bank*, 84 N. Y. 209; 38 Am. Rep. 501. A bank, not accustomed to receive for collection checks drawn upon itself, received a check drawn by one of its depositors in favor of another, credited it in the payee's pass-book, put it on the file of paid and canceled checks, and credited the payee and charged the drawer with it in the books of the bank. *Held*, that this constituted payment, and could not be retracted on discovering that the check was an overdraft, and the drawer was insolvent: *City Nat. Bank of Selma v. Burns*, 68 Ala. 267; 44 Am. Rep. 138. The book-keeper of a commission merchant made out a fictitious account

¹ *Witte v. Vincenot*, 43 Cal. 325.

of sales of the property of a customer, and obtained from his employer his check therefor, to the customer's order, forged the indorsement, and obtained the money. The bank on which the check was drawn subsequently paid it, charged it in the merchant's pass-book, and returned it with other vouchers at the end of the month. The merchant did not discover the facts for some months, and then notified the bank. In an action to recover the balance of his deposit, *held*, that the plaintiff was entitled to recover, as the fraud on him did not contribute to the fraud on the bank, and he was not estopped by his retention of the pass-book and voucher without objection: *Welsh v. German American Bank*, 73 N. Y. 424; 29 Am. Rep. 175.

§ 529. **Loans and Discounts.**—A power to carry on the business of banking by discounting bills, notes, and other evidences of debt is a power to loan money thereon with the right to take lawful interest.¹ Authority given to a bank, in general terms, to deal in bills of exchange empowers it to purchase foreign bills as well as inland.² Power to discount notes gives the right to discount a note under seal.³ But privileges given to a bank to discount moneys deposited for safe-keeping does not extend to special deposits.⁴ It is no defense to an action by a bank against a person indebted upon a valid bill or note that the plaintiff acquired the demand by purchase at a discount greater than such corporations are allowed by statute to take.⁵ Nor can one who has borrowed money from a bank upon securities which it was prohibited from taking for a loan avail himself of the prohibition as an answer to the claim of the bank to be repaid.⁶ A loan by a foreign corporation for the full value of the notes taken is not a discount of the notes within the meaning of a statute.⁷ A note taken by a bank in payment of a pre-existing debt is not discounted within the Maine statute

¹ *Farmers' Nat. Bank v. Baldwin*, 23 Minn. 198; 23 Am. Rep. 683; *First Nat. Bank v. Pierson*, 24 Minn. 140.

⁴ *Foster v. Essex Bank*, 17 Mass. 479; 9 Am. Dec. 168.

² *Bank of Augusta v. Earle*, 13 Pet. 519.

⁵ *Oneida Bank v. Ontario Bank*, 21 N. Y. 490.

³ *Jones v. Bank*, 8 B. Mon. 122; 46 Am. Dec. 540.

⁶ *Allen v. Freedman's Bank*, 14 Fla. 418.

⁷ *Noble v. Cornell*, 1 Hilt. 98.

against discounting a note without two responsible names or collateral security.¹ National banks having the power "to carry on the business of banking by discounting and negotiating" notes, etc., a note taken in the usual course of business may be deemed to have been "discounted," although the term "purchase" might be applied to the transaction.² The mere discounting of paper by a bank, and placing the amount to the credit of a depositor who already has a large balance to his credit, does not make the bank a purchaser for value so as to protect it against infirmities in the paper.³ An agreement by the president and cashier of a bank that the indorser of a promissory note shall not be liable on his indorsement does not bind the bank. It is not the duty of the cashier and president to make such contracts; nor have they the power to bind the bank, except in the discharge of their ordinary duties. All discounts are made under the authority of the directors, and it is for them to fix any conditions which may be proper in loaning money.⁴ A bank is bound to apply deposits of the maker in payment of his note, or the indorser is discharged.⁵ If a bank discounts a note knowing it to be the intention of the party offering it that the proceeds should be applied to the discharge of a particular note held by the bank, those proceeds cannot be applied by the bank to the discharge of any other note.⁶ Where bankers hold security given them by customers for the payment of any balance on account current or otherwise, and, in the ordinary course of business, while holding such securities, they discount bills which have been accepted or indorsed by those customers, they are not bound to apply the security in discharge of the liability of such customers on the bills, but may deal with it without

¹ *Lime Rock Bank v. Hewett*, 52 Me. 531.

² *First Nat. Bank of Greenville v. Sherburne*, 14 Ill. App. 566.

³ *Mann v. Springfield Bank*, 30 Kan. 412.

⁴ *Bank of United States v. Dunn*, 6 Pet. 51.

⁵ *McDowell v. Bank*, 1 Harr. (Del.) 369.

⁶ *Bank of Alexandria v. Saunders*, 2 Cranch C. C. 183.

reference to those transactions.¹ Where a borrower of money at a bank has an opportunity and is able to count the money himself, but does not, and accepts the count of the bank officer as a performance of the contract of loan, the burden of showing a mistake is upon him.²

ILLUSTRATIONS.—The charter of the Central Bank of Georgia limits loans to two thousand five hundred dollars, requires two or more good securities or indorsers on notes and bills, and provides that all notes shall be renewed annually. *Held*, that these provisions were directory merely to the officers, and that a debt might be collected by the bank, although contracted in violation of all these rules: *Bond v. Bank*, 2 Ga. 92. The act incorporating a bank provided that a majority of the directors, the president being one, should form a board or quorum for the transaction of any business; "but ordinary discounts may be made by the president and four directors." "The rate of discount at which loans shall be made shall not exceed one half of one per centum for thirty days." *Held*, that on proof to the court of the discounting of paper by the cashier and president without four directors, and that notes had been discounted at rates greater than that allowed by charter, there was sufficient grounds for a temporary injunction: *Manderson v. Commercial Bank*, 28 Pa. St. 379. A, being debtor to a bank on a note discounted by the bank before the note became due, died, and his estate proved to be insolvent. The bank, at the time of his death, had money of his on deposit. *Held*, that the bank was entitled to apply such deposit money to the payment of the note, notwithstanding there might be debts outstanding against A's estate of superior dignity to that of the note: *Ford v. Thornton*, 3 Leigh, 695. A debtor to a bank on several promissory notes assigned to it a mortgage, solely as collateral security. The bank received the money on the mortgage, and the assignor then brought a suit in equity against the bank to recover the surplus money and for the surrender of the notes paid. *Held*, that the claim was single, and that the action was well brought in equity: *Cahoon v. Bank of Utica*, 7 N. Y. 486.

§ 530. Checks—In General.—A check is a bill of exchange drawn by a customer on his banker, payable on demand, and is governed by the rules relating to such

¹ *Duncan v. North Wales Bank*, 27 Week. Rep. 521.

² *First Nat. Bank v. Haight*, 55 Ill. 191.

instruments.¹ It imports a consideration.² A draft drawn on a firm who do not appear to be bankers is not to be deemed a check, but an inland bill of exchange. One thing which distinguishes a check is, that it is always drawn on a bank or banker.³ A banker's draft, drawn and payable within the country, is not in legal effect a check, and where, before presentation to the bank on which it is drawn, that has funds to meet its payment, the drawer fails and payment is refused on that account by the drawee and the funds paid over to the receiver of the drawer, the payee is not entitled to payment in full out of such funds, but must prorate with the other creditors.⁴ An order in writing, addressed to an individual, to pay a certain sum of money, on a certain day in the future, without grace, to a third person's order, is a bill of exchange, and not a check.⁵ An order for the payment of money "to order of, on sight," drawn on bankers, without specifying any payee or leaving any blank for the insertion of his name, is not a check, and no action lies on it for non-payment.⁶ An order drawn by a bank upon another bank for the payment of a sum certain to a named person, and payable instantly, on demand, is a check.⁷ A check is none the less a check because it contains the words "original" and "second unpaid,"⁸ or because it is made payable in "current

¹ *Eyre v. Walker*, L. J. 29 Ex. 246; *Hopkinson v. Forster*, L. R. 19 Eq. 74; *Harker v. Anderson*, 21 Wend. 372; *Bickford v. Bank*, 42 Ill. 238; 89 Am. Dec. 436; *Bowen v. Newell*, 8 N. Y. 190; *Attorney-General v. Ins. Co.*, 71 N. Y. 325; *Morrison v. Bailey*, 5 Ohio St. 13; 64 Am. Dec. 632; *Woodruff v. Bank*, 25 Wend. 673; *Cutter v. Reynolds*, 65 Ill. 321; *Minturn v. Fisher*, 4 Cal. 36; *Cruger v. Armstrong*, 3 Johns. Cas. 5; 2 Am. Dec. 126; *Humphries v. Bicknell*, 2 Litt. 296; 13 Am. Dec. 268; *Smith v. Jones*, 20 Wend. 192; 32 Am. Dec. 527; *Barbour v. Bayon*, 5 La. Ann. 304; 52

Am. Dec. 593; *Walker v. Geisse*, 4 Whart. 252; 33 Am. Dec. 60. See *post*, Title Negotiable Instruments.

² *Cruger v. Armstrong*, 3 Johns. Cas. 5; 2 Am. Dec. 126.

³ *Harris v. Clark*, 3 N. Y. 92; 51 Am. Dec. 352.

⁴ *Grammel v. Carmer*, 55 Mich. 201; 54 Am. Rep. 363.

⁵ *Hawley v. Jette*, 10 Or. 31; 45 Am. Rep. 129.

⁶ *McIntosh v. Lytle*, 26 Minn. 336; 37 Am. Rep. 410.

⁷ *State v. Vincent*, 91 Mo. 662.

⁸ *Merchants' Bank v. Ritzinger*, 118 Ill. 484.

funds."¹ The insertion of the word "mem." in a bank check does not affect its negotiability or the right of the holder to present it to the bank and demand payment immediately; and the bank will be protected in the payment of such check to the same extent that it would had not that word been inserted.² An order drawn at Kansas City on a bank in New York, to pay money to H., or order, on demand, without days of grace, is not a bill of exchange, but a check.³ A bank check, payable "to the order of 1658," or "to the order of bills payable," stands on the same ground as a check payable to a fictitious person, and is, in judgment of law, payable to bearer.⁴

The formal parts of a check are the signature of the drawer,⁵ a statement of the sum to be paid,⁶ the address,⁷ the date,⁸ and sufficient words of request to pay the sum therein named.⁹ A check is due on the day it is presented;¹⁰ it is not entitled to days of grace.¹¹ A post-dated check is payable at sight or upon presentment thereof at the bank at any time on or after the day of its date.¹² A check is an appropriation of so much of the maker's funds in the bank as is necessary to meet it;¹³ or if the maker's deposit is less than the sum for which the check calls, at the time of presentation, it is an appropriation of the deposit, whatever it may be.¹⁴

Neither at law nor in equity is the drawing of a check

¹ *Bull v. Kasson Bank*, 123 U. S. 105.

² *Dykens v. Leather Mfrs.' Bank*, 11 Paige, 612.

³ *First Nat. Bank of Cincinnati v. Coates*, 3 McCrary, 9.

⁴ *Willets v. Bank*, 2 Duer, 121.

⁵ *Saunderson v. Jackson*, 2 Bos. & P. 238.

⁶ *Corgan v. Frew*, 39 Ill. 31; 89 Am. Dec. 286.

⁷ *Harker v. Anderson*, 21 Wend. 372.

⁸ *Godin v. Bank*, 6 Duer, 76.

⁹ *Wells v. Brigham*, 6 Cush. 6; 52 Am. Dec. 750.

¹⁰ *Trash v. Martin*, 1 E. D. Smith, 511; *Barbour v. Bayon*, 5 La. Ann. 304; 52 Am. Dec. 593; *Morrison v.*

Bailey, 5 Ohio St. 13; 64 Am. Dec. 632.

¹¹ *Salter v. Burt*, 20 Wend. 205; 32 Am. Dec. 530; *Bowen v. Newell*, 2 Duer, 598; *Barbour v. Bayon*, 5 La. Ann. 304; 52 Am. Dec. 593; *Champion v. Gordon*, 70 Pa. St. 474; 10 Am. Rep. 681; *Taylor v. Wilson*, 11 Met. 44; 45 Am. Dec. 180.

¹² *Mohawk Bank v. Broderick*, 13 Wend. 133; 27 Am. Dec. 192; *Salter v. Burt*, 20 Wend. 205; 32 Am. Dec. 530.

¹³ *Emery v. Hobson*, 63 Me. 32; *Deener v. Brown*, 1 McAr. 350; *Bickford v. Bank*, 42 Ill. 238; 89 Am. Dec. 436.

¹⁴ *Bromley v. Bank*, 9 Phila. 522.

such an assignment of the drawer's deposit as to give a right of action upon it by the holder, against the bank, before its certification or acceptance by the latter.¹ Mere notice to a bank that a check has been drawn, and that a party holds it, does not bind the bank, nor give the holder precedence over an attachment subsequently levied before presentment of the check for payment.² The fact that a check was dishonored when transferred does not discharge the drawer; any defense against the payee is available against his transferee. Loss to the drawer by delay in presentment is matter of defense.³

¹ *First Nat. Bank v. Shoemaker*, 117 Pa. St. 94; 2 Am. St. Rep. 649; *Bank of the Republic v. Millard*, 10 Wall. 152; *First National Bank v. Whitman*, 94 U. S. 343; *Colorado National Bank v. Boettcher*, 4 Col. 185; 40 Am. Rep. 142; *Mayer v. Chattahoochee National Bank*, 51 Ga. 325; *National Bank v. Second National Bank*, 69 Ind. 479; 35 Am. Rep. 236; *Harrison v. Wright*, 100 Ind. 515; 58 Am. Rep. 805; *Moses v. Franklin Bank*, 34 Md. 581; *Bullard v. Randall*, 1 Gray, 605; 61 Am. Dec. 433; *Carr v. National Security Bank*, 107 Mass. 45; 9 Am. Rep. 6; *Dickinson v. Coates*, 79 Mo. 250; 49 Am. Rep. 228; *Dykens v. Leather Manufacturers' Bank*, 11 Paige, 613; *Harris v. Clark*, 3 N. Y. 93; 51 Am. Dec. 352; *Winter v. Drury*, 5 N. Y. 525; *Chapman v. White*, 6 N. Y. 412; 57 Am. Dec. 464; *Ætna National Bank v. Fourth National Bank*, 46 N. Y. 82; 7 Am. Rep. 314; *Tyler v. Gould*, 48 N. Y. 683; *Duncan v. Berlin*, 60 N. Y. 151; *Attorney-General v. Continental L. Ins. Co.*, 71 N. Y. 330; 27 Am. Rep. 55; *In re Merrill*, 71 N. Y. 325; *People v. Merchants' Bank*, 78 N. Y. 269; 34 Am. Rep. 532; *Lunt v. Bank of North America*, 49 Barb. 221; *Butterworth v. Peck*, 5 Bosw. 341; *Creveling v. Bloomsbury National Bank*, 46 N. J. L. 255; 50 Am. Rep. 417; *Simmons v. Cincinnati Sav. Soc.*, 31 Ohio St. 457; 27 Am. Rep. 521; *Lloyd v. McCaffrey*, 46 Pa. St. 410; *First National Bank v. Gish*, 72 Pa. St. 13; *Saylor v. Bushong*, 100 Pa. St. 23; 45

Am. Rep. 353; *Planters' Bank v. Merritt*, 7 Heisk. 199; *Purcell v. Allemona*, 22 Gratt. 742; *Byles on Bills*, *23; 2 *Randolph on Commercial Paper*, secs. 643, 644; 3 *Pomeroy's Eq. Jur.*, sec. 1284; *Hopkinson v. Forster*, L. R. 1 Eq. 74; *Shand v. Du Buisson*, L. R. 18 Eq. 283; *Bank of Louisiana v. Bank of New Orleans*, L. R. 6 H. L. 352; *Schroeder v. Central Bank*, 34 L. T. 735; *Exchange Bank v. Rice*, 107 Mass. 37; 9 Am. Rep. 1; *Dana v. Third Nat. Bank*, 13 Allen, 445; 90 Am. Dec. 217; *Northumberland Bank v. McMichael*, 107 Pa. St. 480; 51 Am. Rep. 529; *Coates v. Doran*, 83 Mo. 337; *Mining Co. v. Brown*, 124 U. S. 285; *contra*, *Munn v. Burch*, 25 Ill. 35; *Brown v. Leckie*, 43 Ill. 497; *Union National Bank v. Oceana County Bank*, 80 Ill. 212; 22 Am. Rep. 185; *Ridgely National Bank v. Patton*, 109 Ill. 479, 485; *Lester v. Given*, 8 Bush, 357; *Weinstock v. Bellwood*, 12 Bush, 139; *Fogarties v. State Bank*, 12 Rich. 518; 78 Am. Dec. 468; *Chicago etc. Ins. Co. v. Stanford*, 28 Ill. 168; 81 Am. Dec. 270. The holder of a check may maintain an action against the bank having funds of the drawer, and failing to pay upon presentment and demand: *State Savings Assoc. v. Boatmen's Savings Bank*, 11 Mo. App. 292; and see *Title Negotiable Instruments*, *post*.

² *Bullard v. Randall*, 1 Gray, 605; 61 Am. Dec. 433.

³ *Cowing v. Altman*, 79 N. Y. 167.

ILLUSTRATIONS. — A deposited a check payable to himself and indorsed by him in blank, in a bank, and the bank credited him with the amount of the check in his bank-book. *Held*, that the bank became the owner of the check, and could pass a good title to it: *Metropolitan Bank v. Loyd*, 90 N. Y. 530. A person drew a check on a bank for six hundred dollars, payable on a day stated therein, and sold it. On the day it became payable he paid the amount of it to the cashier. Long afterwards, it was presented at the bank and paid. When it was drawn, and when paid, the drawer had but a few dollars to his credit on the books of the bank. *Held*, that the drawer was not liable: *Lancaster Bank v. Woodward*, 18 Pa. St. 357; 57 Am. Dec. 618. In trover for certain checks, etc., drawn upon banks in New York, it appeared that the plaintiff was in the habit of sending checks to his agent in that city, to be converted into cash, for the purpose of buying eastern money. The plaintiff indorsed the checks in question to his agent, and sent them to him for that purpose. The agent indorsed them to the defendants, who received them without notice of the agency, and paid value by passing the amount to the credit of the agent, and certifying checks on their bank for the amount of the credit. The agent misapplied the funds and failed. *Held*, that the title to the checks passed to the defendants, and therefore that the action would not lie: *Case v. Mechanics' Banking Association*, 4 N. Y. 166. A company gave checks to various creditors. There were then funds in bank sufficient to pay these checks. The president of the company fraudulently obtained possession of these funds. *Held*, that the check-holding creditors could follow the fund or its proceeds, if they could be traced, and that their claim was paramount to the claim of general creditors of the company: *In re National Ins. Co.*, 14 Phila. 149. A drew a check payable to himself or order, and a bank certified it. *Held*, that one to whom the check was not indorsed could not maintain an action against the bank: *Lynch v. Jersey City Bank*, 107 N. Y. 179.

§ 531. Acceptance of Check.—A check is not ordinarily intended for acceptance, but for prompt presentment and payment. But the practice of certifying checks as "good," either by writing thereon or verbally,¹ prevails

¹ *Espy v. Bank*, 18 Wall. 604; *Barnet v. Smith*, 30 N. H. 256; 64 Am. Dec. 290; *Pope v. Bank*, 59 Barb. 226; *Irving Bank v. Wetherald*, 36 N. Y. 335; unless required by statute to be in writing: *Risley v. Phoenix Bank*, 83

N. Y. 318; 38 Am. Rep. 421; *Lynch v. First Nat. Bank*, 107 N. Y. 179; 1 Am. St. Rep. 803. The usual form of certifying a check is by stamping or writing on the check the word "certified," "good," "accepted," or its

extensively in the United States, and the effect of such certification is to discharge the drawer, and to make the bank the primary and principal debtor,¹ and the check may then be kept in circulation.² The certification is equivalent to acceptance. It imports that the check is drawn upon sufficient funds, and that these funds shall be retained and paid upon the check whenever it is presented.³ The fact that a check which has been indorsed "good" was not certified by the cashier at his banking house is no objection to its validity.⁴ In an action by a *bona fide* holder of a check drawn on a bank and certified by its cashier, the defendant is liable, although the drawer had no funds in the bank when the check was certified.⁵ A promise by the bank to pay the check of a person is equivalent to an acceptance by the bank, if communicated to one who took the check on the faith of the promise;⁶

equivalent, with the signature of the certifying officer: See *First Nat. Bank v. Whitman*, 94 U. S. 343, 345; *Rounds v. Smith*, 42 Ill. 245, 255; *Brown v. Leckie*, 43 Ill. 497, 479; *Cook v. State Nat. Bank*, 52 N. Y. 96; 11 Am. Rep. 667; *Pope v. Bank of Albion*, 59 Barb. 226; *Louisiana Nat. Bank v. Citizens' Bank*, 28 La. Ann. 189; 26 Am. Rep. 92; *Mutual Nat. Bank v. Rotgé*, 28 La. Ann. 933; 26 Am. Rep. 126; *Andrews v. German Nat. Bank*, 9 Heisk. 211; 24 Am. Rep. 300; *French v. Irwin*, 4 Bart. 401; 27 Am. Rep. 769.

¹ *First Nat. Bank v. Leach*, 52 N. Y. 350; 11 Am. Rep. 708; *Meads v. Bank*, 25 N. Y. 143; 82 Am. Dec. 331; *Mutual Bank v. Rotgé*, 28 La. Ann. 933; 26 Am. Rep. 126; *Brown v. Leckie*, 43 Ill. 497; *Bickford v. Bank*, 42 Ill. 238; 89 Am. Dec. 436; *First Nat. Bank v. Whitman*, 94 U. S. 343; *Lynch v. First Nat. Bank*, 107 N. Y. 179; 1 Am. St. Rep. 803.

² *Nolan v. Bank*, 67 Barb. 24; *Bickford v. Bank*, 42 Ill. 238; 89 Am. Dec. 436.

³ *French v. Irwin*, 4 Bart. 401; 27 Am. Rep. 769; *Freund v. Importers' etc. Bank*, 76 N. Y. 352; *Stevens v. Corn Exchange Bank*, 3 Hun, 147; 43 How. Pr. 351; *Nolan v. Bank of New*

York, 67 Barb. 24; *Willets v. Phoenix Bank*, 2 Duer, 121; *Merchants' L. & T. Co. v. Bank of Metropolis*, 7 Daly, 137; *Phoenix Bank v. Bank of America*, 1 N. Y. Leg. Obs. 26; *Girard Bank v. Bank of Penn Township*, 39 Pa. St. 92; 80 Am. Dec. 507; 2 Rand. on Com. Paper, secs. 642, 645; 1 Edwards on B. & N., secs. 565, 566; 2 Dan. on Neg. Inst., secs. 1602, 1603; 2 Pars. on Notes and Bills, 74; Morse on Banking, 282; *Robson v. Bennett*, 2 Taunt. 388; *Merchants' Bank v. State Bank*, 10 Wall. 604, 647; *Farmers' etc. Bank v. Butchers' etc. Bank*, 16 N. Y. 125; 69 Am. Dec. 678; *Barnes v. Ontario Bank*, 19 N. Y. 152, 159; *Meads v. Merchants' Bank*, 25 N. Y. 143; 82 Am. Dec. 331; *Smith v. Miller*, 43 N. Y. 171, 176; 3 Am. Rep. 690; *Cook v. State Nat. Bank*, 52 N. Y. 96; 11 Am. Rep. 667; *Drovers' Nat. Bank v. Anglo-American Co.*, 117 Ill. 100; 57 Am. Rep. 855; *Andrews v. Bank*, 9 Heisk. 211; 24 Am. Rep. 300.

⁴ *Merchants' Bank v. State Bank*, 10 Wall. 604.

⁵ *Cook v. Bank*, 52 N. Y. 96; 11 Am. Rep. 667.

⁶ *Nelson v. First Nat. Bank*, 48 Ill. 36; 95 Am. Dec. 510.

but not unless the check was taken on the faith of such promise.¹ And even a verbal promise has been held sufficient, whether the check be existing or non-existing, the check not being within the statute of frauds.² No action lies in favor of the holder of a check against the drawee for non-acceptance, but if the drawee settles with the drawer, retaining just enough to pay the check, a promise may be implied therefrom, on which an action may be maintained.³ The conduct of a bank in deducting the amount of a check from the drawer's account, and settling with him on that basis, is in fact an acceptance;⁴ but payment to a stranger upon an unauthorized indorsement does not operate as an acceptance of the check, so as to authorize an action by the real owner to recover its amount as upon an accepted check.⁵ Acceptance has been held to be a question of fact for the jury under proper instructions.⁶ A bank accepts a check drawn thereon when it indorses upon it a certificate of genuineness, and directs its payment at another bank.⁷ Where the acceptance is certified through mistake, the bank may withdraw it at any time before rights of third parties have intervened.⁸ A check drawn by a depositor payable to himself or order, and accepted by the bank, does not impose on it any obligation to pay the check to one to whom the drawer delivered the check without indorsement, in payment of a purchase made by him.⁹ The holder of a check who deposits it in a bank on which it is drawn, knowing that the drawer has no funds in bank to meet it, cannot recover the amount from the bank, though the bank

¹ *First Nat. Bank v. Pettit*, 41 Ill. 492; *Carr v. National Security Bank*, 107 Mass. 45; 9 Am. Rep. 6.

² *Nelson v. National Bank*, 48 Ill. 36; 95 Am. Dec. 610; but see *Morse v. Mass. Nat. Bank*, 1 Holmes, 209.

³ *Saylor v. Bushong*, 100 Pa. St. 23; 45 Am. Rep. 353.

⁴ *Seventh Nat. Bank v. Cook*, 73 Pa. St. 483; 13 Am. Rep. 751.

⁵ *Bank v. Whitman*, 94 U. S. 343.

⁶ *First Nat. Bank v. McMichael*, 106 Pa. St. 460; 51 Am. Rep. 529.

⁷ *Lynch v. Bank*, 107 N. Y. 179; 1 Am. St. Rep. 803.

⁸ *Second Nat. Bank v. West Nat. Bank*, 51 Md. 128; 34 Am. Rep. 300; *Irving Bank v. Wetherald*, 36 N. Y. 335.

⁹ *Lynch v. Bank*, 107 N. Y. 179; 1 Am. St. Rep. 803.

credited the amount to the holder, and charged it to the drawer, for this does not amount to a payment of the check by the bank, and the holder can retain no credit obtained by his fraud.¹ The certification of a check by the drawee at the request of the indorser before delivery to the holder does not release the indorser.²

Like the acceptance of a bill, the certification of a check, while it admits the signature of the drawer in favor of a *bona fide* holder, does not estop the bank from setting up a forgery in the body of the check when certified.³ The holder of a certified check has a right to look to the bank as well as the drawer; and where the bank has failed and made an assignment, the holder waives none of his rights against the drawer by giving notice to the assignee not to pay over any money to the drawer, as the holder looked to the bank for the amount of the check.⁴

ILLUSTRATIONS. — The defendant drew his check to the order of D., which was discounted by the plaintiff. It was presented when due to the bank on which it was drawn for certification, and was certified as good. In the afternoon of the same day it was presented for payment, and payment refused, the drawee having in the intermediate time suspended. *Held*, that the certification operated as a payment of the check as between the holder and the drawer, and the latter was discharged from liability: *First Nat. Bank v. Leach*, 52 N. Y. 350; 11 Am. Rep. 708. On a check drawn to C, B indorsed C's name without C's authority, and received the money, and the bank deducted the check from the drawer's account, and settled with him on that basis. *Held*, that C could recover the amount of the check from the bank. The bank was bound as if by acceptance of a certified check: *Seventh Nat. Bank v. Cook*, 73 Pa. St. 483; 13 Am. Rep. 751. A bank was chargeable with negligence in certifying a check which was so draughted as to admit of a fraudulent alteration of the amount being easily made, and the check was raised. *Held*, that the bank was liable to a *bona fide* holder for value

¹ *Peterson v. Bank*, 52 Pa. St. 206; 91 Am. Dec. 146.

² *Mutual Nat. Bank v. Rotgé*, 28 La. Ann. 933; 26 Am. Rep. 126.

³ *Security Bank v. Bank*, 67 N. Y. 458; 23 Am. Rep. 129; *Marine Bank v. City Bank*, 59 N. Y. 67; 17 Am. Rep.

305; *Hagan v. Bowery Bank*, 6 Lans. 490; *Nat. Bank v. Nat. Banking Ass'n*, 55 N. Y. 211; 14 Am. Rep. 232; *Espy v. Bank*, 18 Wall. 604; *contra*, *La. Bank v. Bank*, 28 La. Ann. 189.

⁴ *Bickford v. Bank*, 42 Ill. 238; 89 Am. Dec. 436.

for the increased amount: *Helwege v. Hibernia Nat. Bank*, 28 La. Ann. 520. K.'s father drew a check to K.'s order, and K. delivered it unindorsed to the stock exchange as a margin. On the same day, and before it was presented to the bank, K. notified the bank not to pay it; nevertheless the bank officers certified the check. *Held*, that a decree was proper that the check was void, and that the bank must place its amount to K.'s credit: *Public Grain and Stock Exchange v. Kune*, 20 Ill. App. 137. A check drawn to the order of the plaintiff upon the defendants, a bank in New Jersey, was deposited in the Bank of Commerce of New York City, and was transmitted by the latter bank to the drawees for payment, and they retained it for nearly twenty-four hours, when it was returned to the Bank of Commerce, marked "not good." *Held*, that the delay in making the return of the check did not constitute an acceptance by the drawee, upon the ordinary principles of the law merchant governing acceptance of bills: *Overman v. Hoboken City Bank*, 31 N. J. L. 563. A drew upon a bank in which he had no funds a check reciting that it was "to hold as collateral," etc. The cashier certified it. *Held*, that the bank was not bound by such certification, the check manifestly not being in the usual course of banking business: *Dorsey v. Abrams*, 85 Pa. St. 299; 27 Am. Rep. 657. A stranger presented to the O. bank a check purporting to be drawn by C. on the A. bank, and the O. bank paid it without requiring proof of the identity of the stranger. The check was then sent to the L. bank, which credited the O. bank with it, and was sent from there to the A. bank, which paid it. Some days afterwards the check was discovered to be a forgery. *Held*, that the O. bank was liable for the amount: *Orleans Bank v. State Bank*, 22 Neb. 769.

§ 532. Presentment for Payment.—A check must be presented within a reasonable time.¹ If the person receiving the check, and the banker on whom it is drawn, are in the same place, the check must, in the absence of special circumstances,² be presented for payment on the day after it is received.³ The holder of a check, in order

¹ *Cruger v. Armstrong*, 3 Johns. Cas. 5; 2 Am. Dec. 126.

² *Firth v. Brooks*, 4 L. T., N. S., 467.

³ *Taylor v. Wilson*, 11 Met. 44; 45 Am. Dec. 180; *Bickford v. Bank*, 42 Ill. 238; 89 Am. Dec. 436; *Himmelmann v. Hotelling*, 40 Cal. 115; 6 Am. Rep. 600; *Alexander v. Burchfield*, 7 Man. & G. 1061; *Simpson v. Ins. Co.*,

44 Cal. 139; *Smith v. Miller*, 43 N. Y. 171; 3 Am. Rep. 690; 6 Robt. 418; *Burkhalter v. Bank*, 42 N. Y. 538; *Cawein v. Browinski*, 6 Bush, 457; 99 Am. Dec. 684; *Andrews v. Bank*, 9 Heisk. 211; 24 Am. Rep. 300; *Mohawk Bank v. Broderick*, 13 Wend. 133; 27 Am. Dec. 192; *Merritt v. Todd*, 23 N. Y. 28; 80 Am. Dec. 243; *Syracuse etc.*

to recover against the drawer, must prove due presentment and notice of non-payment, or some legal excuse for absence thereof.¹ If the person who receives a check, and the banker on whom it is drawn, are in different places, the check must, in the absence of special circumstances,² be forwarded for presentment on the day after it is received, and the agent to whom it is forwarded must, in like manner, present it or forward it on the day after he receives it.³ The drawer of a check is not discharged by the holder's omission to present it for payment within a reasonable time, or to give due notice of dishonor, unless the drawer has suffered actual damage through the delay.⁴ The indorser of a check held for seven days before presentment is not liable, even though there were no funds in bank to the drawer's credit when the check was drawn.⁵ But where one indorses a check as surety, he must be presumed to know that it is not to be used in the usual manner, but that it is to be held for some time, and he is not released from liability by the fact that payment was not demanded within a reasonable time, unless he also shows either an extension of time to the principal debtor without his assent, or a specified limitation by himself.⁶ When a check is not presented within a reasonable time

R. R. Co. v. Collins, 3 Lans. 32; Harbeck v. Craft, 4 Duer, 129; Kelty v. Bank, 52 Barb. 334; Smith v. Janes, 20 Wend. 192; 32 Am. Dec. 527; Holmes v. Roe, 62 Mich. 199; 4 Am. St. Rep. 844. A violent storm, and the fact that the holder resides some distance from the bank, will not excuse a failure so to do: McDonald v. Mosher, 23 Ill. App. 206.

¹ Mechanics' and Traders' Ins. Co. v. Coons, 35 La. Ann. 364.

² Firth v. Brooks, 4 L. T., N. S., 467.

³ Hare v. Henty, 30 L. J. C. P. 302; Prideaux v. Criddle, L. R. 4 Q. B. 455; Griffin v. Kemp, 46 Ind. 176; Veazie Bank v. Winn, 40 Me. 61; Woodruff v. Plant, 41 Conn. 344; Smith v. Janes, 20 Wend. 192; 32 Am. Dec. 527.

⁴ Alexander v. Burchfield, 7 Man. & G. 1061; Robinson v. Hawksford, 9 Q. B. 52; Laws v. Rand, 27 L. J. C. P. 76; Bailey v. Bodenham, 33 L. J. C. P. 253; Heywood v. Pickering, 9 L. R. Q. B. 432; Stewart v. Smith, 17 Ohio St. 82; Allen v. Kramer, 2 Ill. App. 205; Shaffer v. Maddox, 9 Neb. 205; Clark v. Bank, 2 McAr. 249; Griffin v. Kemp, 4 Ind. 172; Planters' Bank v. Merritt, 7 Heisk. 177; Eichelberger v. Finley, 7 Har. & J. 381; 16 Am. Dec. 312; Compton v. Gilman, 19 W. Va. 312; 42 Am. Rep. 776; Pack v. Thomas, 13 Smedes & M. 11; 51 Am. Dec. 135.

⁵ Northwestern Coal Co. v. Bowman, 69 Iowa, 150.

⁶ Newman v. Kaufman, 28 La. Ann. 865; 26 Am. Rep. 114.

of its issue, and the drawer sustains actual damage through the delay, it is no excuse that such delay was caused by the *bona fide* negotiation of the check through different hands.¹ Post-dated checks are payable on, or at any time after, the day of their date;² and payment by a bank of such a check before that day is a payment in its own wrong,³ and is no defense to an action for the amount of the fund, by the assignee in good faith of the fund.⁴ Overdrafts paid by a bank may be recovered by the bank from the person so overdrawing.⁵ Where a bank paid a

¹ Mohawk Bank v. Broderick, 13 Wend. 133; 27 Am. Dec. 192.

² Taylor v. Sip, 30 N. J. L. 284; and see Salter v. Burt, 20 Wend. 205; 32 Am. Dec. 530; Matter of Brown, 2 Story, 502; Bull v. O'Sullivan, L. R. 6 Q. B. 209; Gatty v. Fry, L. R. 2 Ex. Div. 265.

³ Taylor v. Sip, 30 N. J. L. 284. A post-dated check payable to order is not illegal: Emanuel v. Robarts, 9 Best & S. 121.

⁴ Godin v. Bank of Com., 6 Duer, 76.

⁵ Franklin Bank v. Byram, 39 Me. 489; 63 Am. Dec. 643; Rock River Bank v. Sherwood, 10 Wis. 230; 78 Am. Dec. 669. But in Pennsylvania it is held that the absence of funds on deposit is notice to the bank not to pay the check, and if it does so, it cannot recover from the customer. The customer in this case had paid the check before it was presented, but had neglected to take it up, and it was presented to the bank more than a year after its date: Lancaster Bank v. Woodward, 18 Pa. St. 357; 57 Am. Dec. 618. The court said: "Had it been a negotiable note, there can be no doubt an indorsee would have taken it at his peril. The indorsee of overdue paper takes it exclusively on the credit of the indorser, and subject even without *mala fides* to all the intrinsic considerations that would affect it between the original parties: Snyder v. Riley, 6 Pa. St. 164; 47 Am. Dec. 452. But a note is much higher evidence of indebtedness than a check. Indeed, a check of itself is not evidence of a debt or loan of money. The presumption is, that it was given in pay-

ment of a debt, or that cash was given for it at the time: Flemming v. McClain, 13 Pa. St. 178; 47 Am. Dec. 452. Checks are no doubt often negligently retained and presented long after they should be; but when a bank sees that a customer appointed a day in his check for its payment, that that day has long since passed, and that no funds have been deposited to meet it, the bank must be held to the rule in regard to other overdue paper, and be presumed to have taken it on the credit of the indorser. These circumstances are sufficient to put the bank on inquiry, and therefore they are not to be regarded as innocent indorsees without notice. But the bank attempts to justify itself in paying this overdue check when the drawer had no funds in its vaults, on the ground that he was a customer in good credit, and had given no notice to them that it had been paid. The absence of deposits was a sufficient notice to them not to pay the check, for checks are always supposed to be drawn on a previous deposit of funds: Story on Promissory Notes, § 41. In Fletcher v. Manning, 12 Mees. & W. 571, it was held that a check presented and paid is no evidence of money lent or advanced by the banker to the customer. On the contrary, it is *prima facie* evidence of the repayment to the amount of the check by the banker to the customer, of money previously lodged by the customer in the banker's hands. Such is the usual course of business, and the very wide departure from it by the Lancaster Bank, in paying this overdue check out of other funds than those of the

check, erroneously supposing that it had funds of the drawer, and the messenger, to whom the bank made payment, paid over in good faith the money to the payee, it was held that the bank could not recover the amount from the messenger.¹

ILLUSTRATIONS. — A draws a check in favor of C in 1870. It is presented for payment in 1872, and dishonored. No reason for the delay is shown. A is not discharged. The holder can sue him: *Laws v. Rand*, 27 L. J. C. P. 76. A check drawn by A on a L. bank is handed to the payee in L. on Monday. On Wednesday morning the bank on which it is drawn stops payment, A having at that time funds there sufficient to meet it. The check is presented on Wednesday afternoon. A is discharged: *State v. Gates*, 67 Mo. 139; *Farwell v. Curtis*, 7 Biss. 160. On April 5th defendant gave plaintiff a check on the bank of New Lisbon, in payment of certain goods. Plaintiff, who resided in Chicago, sent the check by mail to said bank, to be paid and returned to them. It reached the bank on the 7th, and the amount was immediately charged against defendant, who had funds to cover it, and a draft on the Union National Bank at Chicago was sent to plaintiffs. The draft was received by plaintiffs on the 9th, and on the 10th presented to the Chicago bank, who refused payment. The bank at New Lisbon had meanwhile stopped payment, though on the 7th it had the money to pay the check. *Held*, that the plaintiffs had been guilty of negligence, and could not recover: *Farwell v. Curtis*, 3 Cent. L. J. 352. The plaintiff, desiring to make

drawer, cannot be justified. It was attempted to prove a custom to pay overdrafts of solvent dealers with banks, but it failed; and if it had not failed, such a custom should be abolished. *Malus usus abolendus est*. Our banking institutions are generally conducted by boards of directors, to whom stockholders look for the proper use and management of the capital invested; whilst the ordinary routine of daily business is intrusted to cashiers and clerks, who are not directors, generally not stockholders, and who have no power to discount paper. If these subordinate officers might pay checks which are properly drafts on funds deposited, when there were no funds of the drawer on deposit, the capital of banks would be liable to perversion to purposes and in modes that were

never contemplated either by the legislature or the stockholders. That the practice of paying overdrafts has prevailed to some extent is quite likely; and it may be true that boards of directors have in some instances sanctioned it; but it has no authority in sound usage or in law. The more nearly these institutions keep in the line of regular business transactions, the more effectually will they accommodate the public and secure their own interests. In the case before us, the Lancaster Bank was informed by its own books that the defendant had no funds on deposit out of which to pay the check, and the bank possessed no other funds out of which it had a right to pay it."

¹ *Penacook Savings Bank v. Hubbard*, 58 N. H. 167.

a remittance to a creditor at a distance, and there being no bank in the place where he lived, asked the defendant, who had an account with a banker in a neighboring city, to take the amount of him in bank bills, and give him his check therefor, and the defendant, fully understanding the object, took the bank bills and gave the plaintiff his check upon the banker, payable to the plaintiff's order, the defendant the same day depositing the bills with the banker. The plaintiff at once indorsed the check to his creditor, and sent it by the next mail. It was three days before the check reached the place where the banker resided and was presented for payment, at which time the banker had failed and payment was refused. The plaintiff, having taken up the check, sued the defendant thereon. *Held*, that the check was presented within a reasonable time under the circumstances, and that the defendant was liable: *Woodruff v. Plant*, 41 Conn. 344. The defendants, a firm in Buffalo, who were indebted to the plaintiff's firm in New York, forwarded by mail a draft on J. K. P. & Co., a business house in New York. The plaintiff, about half-past one on the day of its receipt, presented the draft to J. K. P. & Co., and received that firm's check for the amount. J. K. P. & Co. had funds in the bank on which the check was issued, and the check would have been paid if it had been presented that day. The check was deposited by plaintiff in their own bank, and it did not reach the other bank until twelve o'clock the next day, and after J. K. P. & Co. had failed. *Held*, that the plaintiffs were guilty of laches in failing to present the check on the day it was received, and the defendants were released from liability for their indebtedness: *Smith v. Miller*, 43 N. Y. 471; 3 Am. Rep. 690. A creditor received on account of his debt, at his own dwelling, in the evening of Wednesday, his debtor's check on a bank in a town fifteen miles away. The mail to that town closed at the post-office nearest to and three or four miles from the creditor's residence at 7:30 o'clock the next morning, and the next following mail closed at the same hour on Saturday, arriving at the bank town between 11, A. M., and noon. The check was not sent by either mail. The bank stopped payment at noon on Saturday. *Held*, that there was no laches in not sending the check on Thursday, nor on Saturday: *Cox v. Boone*, 8 W. Va. 500; 23 Am. Rep. 627. A negotiable check, drawn in New York upon a Mississippi bank, and payable on demand, was presented in Mississippi ten months after date, and shortly after the bank had stopped payment, the bank being at the time indebted to the drawer: *Held*, too late. *Little v. Phœnix Bank*, 2 Hill, 425. A check was received in S. on the 14th of January, drawn on a bank in A., distant sixteen miles from S., and between which places there was a

daily mail, and it was not presented till February 6th. *Held*, that the indorser was discharged by the holder's laches: *Mohawk Bank v. Broderick*, 10 Wend. 304; 13 Wend. 133; 27 Am. Dec. 192. The holder of a bank check neglected for eight days to present it for payment. Meantime the bank failed. Previous to the failure the drawers drew out all their funds. *Held*, that the drawers were liable to the holder on the check, although the bank would have paid it if promptly presented, and although the assignee of the bank in bankruptcy recovered from the drawers the money so drawn by them: *Kinyon v. Stanton*, 44 Wis. 479; 28 Am. Rep. 601. Before making an assignment for the benefit of creditors, the assignor gave a bank check, which was presented to the bank for payment after the bank had notice of the assignment. *Held*, that the bank was justified in refusing to pay the check: *Laclede Bank v. Schuler*, 120 U. S. 511. The holder of a negotiable bank check, drawn the day previous, presented it for payment, which was refused. On the same day he transferred it for a valuable consideration to plaintiff, who took it in good faith and without notice of the previous dishonor, and immediately on the same day presented it to the drawee, whereupon payment was again refused. *Held*, that plaintiff could recover of the drawer, a sufficient time after the check was drawn not having elapsed, when plaintiff took it, to raise the presumption of dishonor, although the drawer and drawee were residents of the same city: *Himmelmann v. Hotaling*, 40 Cal. 111; 6 Am. Rep. 600. A, B, and C resided in W. A kept his bank account with D, a private banker there, who was known to B and C, and with whom C had sometimes done his banking business. A gave to B a check, good at the time, using a blank check upon the First National Bank of Milwaukee, erasing the words "First National," and writing above them the name of D, but neglecting to erase the words "Bank of Milwaukee." B, two days later, sold the check to C, who held it a week, and then D failed, and it was never paid. *Held*, that no action could be maintained against A upon the check: *Cork v. Bacon*, 45 Wis. 192; 30 Am. Rep. 712. A gave to B a check on a bank in Detroit, where A did business. B told A that he was going to take the check home to another town. This B did. The bank failed. Had the check been presented at once, it would have been paid. B sued A, and it became a question whether A consented to the check being carried away, the testimony on this point being irreconcilable. *Held*, that on this question A's liability depended: *Holmes v. Roe*, 62 Mich. 199.

§ 533. **Duty of Banker to Honor Checks.**—A banker, as such, is bound to honor his customers' checks, when

duly presented, to the extent of the balance which the customer then has in his hands. If the banker make default, he is liable to his customer in an action for damages.¹ A depositor may draw his check on his banker at pleasure in the regular course of business, either for the full amount of his deposit, or for any part thereof.² A drawer of a bank check payable to the order of another has no right of action upon the check as an obligation payable to himself, but has a right of action against the bank to recover damages for the dishonor of his checks, or specifically to recover the amount of his deposit.³ And where a bank is directed to apply a deposit to the payment of a note of a depositor, and neglects or refuses to do so, it is liable to an action by the depositor.⁴ A direction in a note making it payable at a given bank is equivalent to a request to the bank to pay it.⁵ A direction by a customer not to permit his account to be overdrawn beyond a certain amount does not relieve him from liability on checks drawn beyond that amount.⁶ Where money is deposited in bank by a board of street examiners, as such, and they are superseded by a new board, the money so deposited is subject to the order of the new board.⁷ Where a deposit is made by a person purporting to act as agent for a disclosed principal, the bank cannot assume that he is a fictitious person, and if it does so, it will act at its peril.⁸ Checks are not payable in order of priority in which they are given, but in the order of their presentation for payment.⁹ Where checks

¹ *Morse on Banks*, 520; *Grant on Bankers*, 45; *Rolin v. Stewart*, 14 Com. B. 595; *Marzetti v. Williams*, 1 Barn. & Adol. 415; *Whitaker v. Bank*, 1 Crompt. M. & R. 744; *Gray v. Johnston*, L. R. 3 H. L. 1; *Goodwin v. Robarts*, L. R. 10 Ex. 351; *Bickford v. Bank*, 42 Ill. 238; 89 Am. Dec. 436; *Citizens' Bank v. Traders' Bank*, 44 Hun, 386; *Tassell v. Cooper*, 9 Com. B. 509; *Nat. Mahaiwe Bank v. Peck*, 127 Mass. 298; 34 Am. Rep. 368.

² *Chicago etc. Ins. Co. v. Stanford*, 28 Ill. 168; 81 Am. Dec. 270.

³ *First National Bank v. Shoemaker*, 117 Pa. St. 94; 2 Am. St. Rep. 649.

⁴ But the holder cannot sue: *Pease v. Warren*, 29 Mich. 9; 18 Am. Rep. 58.

⁵ *Griffin v. Rice*, 1 Hilt. 184.

⁶ *Bremer Bank v. Mores*, 73 Iowa, 289.

⁷ *Carman v. Franklin Bank*, 61 Md. 467.

⁸ *Honig v. Pacific Bank*, 73 Cal. 464.

⁹ *Bullard v. Randall*, 1 Gray, 605; 61 Am. Dec. 433.

are presented by different individuals, at the same time, to an amount greater than the fund of the drawer in the bank, the officers of the bank are not bound to settle the conflicting claims of the holders of the different checks to priority of payment.¹ A mere permission to overdraw, revocable at pleasure, is not an "authority" to overdraw which binds the bank to honor checks, and so warrants the party drawing the check in stating that the check is good.² The obligation of a bank to pay a certified check to one presenting it, after the maker's funds in the bank have been attached, depends upon the *bona fides* of the holder. If the bank has notice that this is lacking, it pays the check at its peril.³ A banker is not liable to a customer for the dishonor of a check, where the sum of money for which the check is drawn is not filled in the body of the instrument.⁴ Where the payee of a check on a bank offers to take a smaller sum than the amount to the credit of the drawer, it is the duty of the bank to pay it to him, and indorse the amount paid on the check.⁵

The depositor is entitled to nominal damages, whether he proves actual damages or not.⁶ In the case of a trader, however, he may recover substantial damages without other proof, the act of dishonoring his check being an injury to his credit, and standing as such.⁷ It is a good defense that it had not sufficient unencumbered funds of the depositor with which to make full payment, so that it could take up and hold the check as a voucher, for the bank is under no obligation to make part payment.⁸ A

¹ Dykers v. Bank, 11 Paige, 612.

² Ballard v. Fuller, 32 Barb. 68.

³ Gibson v. Park Bank, 49 N. Y. Sup. Ct. 429.

⁴ Hulls v. Commercial Bank, Vict. July 4, 1884; 6 Aust. L. T. 9.

⁵ Bromley v. Commercial Nat. Bank, 9 Phila. 522.

⁶ Watts v. Christie, 11 Beav. 546; Marzetti v. Williams, 1 Barn. & Adol. 415.

⁷ Rolin v. Stewart, 14 Com. B. 607.

⁸ Coats v. Preston, 105 Ill. 473;

Morse on Banks and Banking, 521; 2 Parsons on Notes and Bills, 78; In re Brown, 2 Story, 502, the court saying: "Now, the bank is not bound to pay unless it is in full funds, and it is not obliged to pay or accept to pay, if it has partial funds only, for it is entitled to the possession of the check on payment, and indeed, in the ordinary course of business, the only voucher for the bank in any payment is the production and receipt of the check, which the holder cannot safely

banker is entitled to have funds paid in a reasonable time before the customer draws against them, in order that he may be aware of the state of accounts between them when the check is presented.¹ A check on payment becomes the property of the drawer,² but the banker who pays it is entitled to keep it as a voucher until his account with his customer is settled.³ There is no obligation on the part of the payee of a check to indorse it when it is paid to him.⁴ The drawer of a check on a bank where he has no funds is not entitled to notice of non-payment.⁵ A drawer of a check injured by want of notice of its dishonor is only exonerated to the extent of the injury. A mere partial injury would not entitle him to be exonerated from the whole debt.⁶

ILLUSTRATIONS.—The defendant bank dishonored two of plaintiff's checks for the aggregate sum of \$318, while he had \$600 in the bank to his credit, and the bank held none of his paper. The defendant gave him a letter to show to the banks which had presented the checks, and those who would have known it, which stated that the error was due to a clerk's miscalculation, and that they regretted the affair, and that the plaintiff's credit had always been high. *Held*, that the plaintiff was entitled to damages: *Birchall v. Third Nat. Bank*, 19 Cent. L. J. 391. After having made an assignment for creditors, A drew his check, which he dated prior to the assignment, but which was presented afterwards, on a bank which knew of the assignment, but not of the antedating. *Held*, that payment by the bank was no defense to a suit by A's assignee to recover funds of A on deposit: *Chaffee v. Ravenna Bank*, 40 Ohio St. 1.

part with unless he receives full payment, nor the bank exact unless under like circumstances."

¹ *Whitaker v. Bank*, 1 Crompt. M. & R. 744; *Bransby v. Bank*, 14 L. T., N. S., 403; *Fernandey v. Glynn*, 1 Camp. 426. In *Marzetti v. Williams*, 1 Barn. & Adol. 415, a deposit, which together with the other funds of the customer already in the bank sufficient to meet the draft, was made a few minutes before eleven o'clock in the forenoon, and the check was presented for payment ten minutes before three o'clock in the afternoon of the same day. This was held to be a sufficient

time intervening for the bank "to avail itself of the deposit." In *Rolin v. Stewart*, 14 Com. B. 607, the deposit was made at one o'clock P. M., and the check presented at three P. M. the same day. The two hours was held to be sufficient time.

² *Reg. v. Watts*, 2 Den. C. C. 15.

³ *Charles v. Blackwell*, L. R. 2 Com. P. Div. 151; In re *Brown*, 2 Story, 519.

⁴ *Osborn v. Gheen*, 5 Mackey, 189.

⁵ *Eichelberger v. Finley*, 7 Har. & J. 381; 16 Am. Dec. 312.

⁶ *Pack v. Thomas*, 13 Smedes & M. 11; 51 Am. Dec. 135.

A person having funds deposited in a bank drew a check in favor of different persons thereon to a much larger amount than his deposit, and afterwards, on the same day, in banking hours, forbade the bank to pay the checks, and some time afterwards drew out the whole of such fund for the purpose of distributing it ratably among all the check-holders. *Held*, that the owner of a check, who demanded payment of the bank after it was forbidden to pay, and before the fund was drawn out, was not entitled to claim the amount of the bank: *Dykens v. Bank*, 11 Paige, 612.

§ 534. **Acceptance or Payment of Forged or Altered Check.**—A bank, being bound to know the signature of its customer, pays a forged check at its peril.¹ But it is not bound to know the signatures of indorsers, except the one presenting it for payment.² A depositor has the right to suppose that the bank will only pay out his money upon his own signature or that of his agent, and upon the conditions specified in the check. It is the duty of the bank to be satisfied that the indorsement of the check is that of the payees.³ A bank cannot be excused for negligent performance of duty imposed by law of examining its customer's signature to a check because the innocent holder, happening to be another bank, has merely failed, on receiving it, to observe a usage or practice adopted for its own security, as of requiring evidence of the payee's identity, before receiving on deposit a check drawn upon

¹ *First Nat. Bank v. State Bank*, 22 Neb. 769; 3 Am. St. Rep. 294; *Price v. Neale*, 3 Barr. 1355; *Jenys v. Fowler*, 2 Strange, 946; *Wilkinson v. Lutwidge*, 1 Strange, 648; *Barber v. Ginnell*, 3 Esp. 60; *Smith v. Chester*, 1 Term Rep. 655; *Bass v. Clive*, 4 Moore & S. 13; *Forster v. Clements*, 2 Camp. 17; *Smith v. Mercer*, 6 Taunt. 76; *Young v. Adams*, 6 Mass. 157; *Markle v. Hatfield*, 2 Johns. 455; 3 Am. Dec. 446; *Gloucester Bank v. Salem Bank*, 17 Mass. 33; *Bank of Commerce v. Union Bank*, 3 N. Y. 230; *Weisser v. Denison*, 10 N. Y. 68; 61 Am. Dec. 731; *Goddard v. Merchants' Bank*, 4 N. Y. 147; *National Park Bank v. Fourth National Bank*, 46

N. Y. 77; 7 Am. Rep. 310; *Bank of the United States v. Bank of Georgia*, 10 Wheat. 333; *Commercial etc. Bank v. First National Bank*, 30 Md. 11; 94 Am. Dec. 554; *First National Bank v. Ricker*, 71 Ill. 439; 22 Am. Rep. 104; *Bernheimer v. Marshall*, 2 Minn. 78; 72 Am. Rep. 79; *Levy v. Bank of the United States*, 4 Dall. 234; *Laborde v. Consolidation Ass'n*, 4 Rob. 190; 36 Am. Dec. 517.

² *Levy v. Nat. Bank*, 24 La. Ann. 220; 13 Am. Rep. 124; *Dodge v. Nat. Ex. Bank*, 20 Ohio St. 234; 6 Am. Rep. 648; *Redington v. Woods*, 45 Cal. 406; 13 Am. Rep. 190.

³ *Vanbibber & Co. v. Bank*, 14 La. Ann. 481; 74 Am. Dec. 442.

another bank.¹ If a person presents a telegraph order for money to a bank, and is identified by a third person, the bank is not guilty of negligence in paying him the money, although it turns out he is not the person named in the order.² In an Ohio case, a custom was proved for the cashier or teller of a bank to whom a check drawn upon another bank was presented, and payment or purchase requested by an unknown bearer, to take means to assure himself that all was right, and for the drawee bank, upon receiving a check through another bank, to assume, relying upon the custom, that such inquiries had been made.³ In an action by a bank to recover the amount paid upon a raised check which had been certified by it, evidence that by the custom and common understanding of banks and merchants the word "certified," at the time of the certification, when used in the certification of checks, imported an obligation on the part of the certifying bank to pay the amount stated in the check, notwithstanding the body of it was forged, was held inadmissible.⁴ The law attaches no sanctity to a clearing-house, as a source of communication between banks; and where a bank pays a

¹ Commercial etc. Bank v. Bank, 30 Md. 11; 96 Am. Dec. 554.

² Bank of California v. Western Union Tel. Co., 52 Cal. 280.

³ Ellis v. Ohio Life Ins. Co., 4 Ohio St. 628, the court saying: "If this custom was established to the satisfaction of the jury, the fair presumption arising would be, that the defendants had been negligent in failing to comply with an established custom of the business, necessary not only to their own security, but also to that of the bank upon which the check was drawn, and that the plaintiffs, not being informed to the contrary, paid the check upon the supposition that the custom had been observed. . . . The custom which the plaintiffs sought to establish, seems to have been one of the most reasonable character. It is a great error to suppose that the drawee of a bill or check is bound to rely alone

upon his knowledge of the handwriting of his customer or correspondent. The testimony in the case, as well as every day's experience, shows this alone to be an insufficient security, when dealing with strangers, and in large amounts, against the ingenuity with which forgeries are now committed. The next most effective precaution is that of requiring the holder to furnish some reliable information of himself and of his right to the paper. But when another bank intervenes and takes the check, this cannot be resorted to by the drawee. As between the banks, therefore, the observance of the custom becomes a matter of mutual protection, and saves to the drawee the benefit of this precaution." And see *Mahaiwe Bank v. Douglass*, 31 Conn. 170.

⁴ *Security Bank v. Nat. Bank*, 57 N. Y. 458; 23 Am. Rep. 129.

forged check of one of its own customers to another bank with which the check had been deposited, the fact that it came through the clearing-house affords no shadow of excuse to the former bank in attempting to recover the money of the latter.¹ Under a rule of the clearing-house that bad checks received from other banks are to be returned as soon as it is found that they are bad, "and in no case are they to be retained after one o'clock," a bank may recover from the bank to which such a check is returned after one o'clock, if the position of the latter bank has not been altered in the matter since one o'clock.² A bank receiving a deposit of a check drawn upon another bank is not obliged to notify the latter that the check has been received from a stranger; and a failure to do this is not negligence, or evidence of negligence, affecting the former bank's right to retain the money paid upon the check, should it afterwards be discovered to be a forgery.³ As between two banks equally innocent and equally deceived by a forged check, but where one is bound to know the signature and to act upon its knowledge and the other has no means of knowledge, the loss should be thrown upon the former, rather than upon the latter.⁴ The drawee of a bill is presumed to have a better knowledge of the signature of the drawer than the holder. So where a bank cashed a draft, and afterward collected it out of the drawee, and it proved to be forged, it was held that the drawer had no redress against the bank, although the latter had received the draft from an unknown holder without requiring his indorsement.⁵ Where a bank, without instructions, pays a forged acceptance, and sends the same by mail to the firm whose names are forged as acceptors, it does not become thereby entitled to a credit

¹ Commercial etc. Bank v. Bank, 30 Md. 11; 96 Am. Dec. 555.

² Merchants' Bank v. Commonwealth Bank, 139 Mass. 513; but *contra*, Preston v. Canadian Bank, 23 Fed. Rep. 179.

³ Commercial etc. Bank v. Bank, 30 Md. 11; 96 Am. Dec. 555.

⁴ Commercial etc. Bank v. Bank, 30 Md. 11; 96 Am. Dec. 554.

⁵ Howard v. Bank, 28 La. Ann. 727; 26 Am. Rep. 105.

for the amount thereof against the firm.¹ A banker who receives a forged check in payment, and keeps it for two months without giving to the *bona fide* holder from whom he received it notice that it was forged, must bear the loss.²

ILLUSTRATIONS.—A check for twenty-seven dollars was drawn by the Bank of Mobile upon the plaintiff bank, and was thereafter fraudulently raised to two thousand seven hundred dollars, and was then presented to the plaintiff bank, whose cashier wrote upon it, over his signature, the word "good." The plaintiff bank afterwards paid the check in ignorance of the felony, and then brought this action against the bank presenting the check to recover back the money so paid. *Held*, that the fact of having certified the check as "good" obliged the plaintiff bank to bear the loss: *Louisiana Nat. Bank v. Citizens' Bank*, 28 La. Ann. 189; 26 Am. Rep. 92. A check drawn on defendant, and sent by mail from Chicago to New York, addressed to D., the payee, was afterwards presented to and certified by defendant. It was thereafter changed by raising the amount and making plaintiffs the payees. The plaintiffs, to whom it was presented as so altered, were informed by defendant's paying teller, through a messenger, that the certification was good, and they thereupon took the check, paying value. Before the inquiry by plaintiffs, defendant had been informed of the non-receipt by the payee of the check mailed, a duplicate was asked for, and payment of the original had been stopped. The teller, when the inquiry was made, did not know that the check shown him was the one which had been stopped. *Held*, that as the inquiry related only to the genuineness of the certification, and the attention of the teller was called to nothing else, the teller's answer imposed no greater or broader liability than if the check had then first been presented for certification, and the bank was not liable in an action to recover the amount paid upon the raised check: *Clews v. Bank of N. Y.* 89 N. Y. 418; 42 Am. Rep. 303. Checks forged by the confidential clerk of the depositor were paid by the bank, charged to the depositor in his pass-book, the book balanced, and, with the forged vouchers, among others, returned to the clerk, who examined the account at his principal's request, and reported it correct, and the principal did not discover the forgeries until several months afterwards, when he immediately made them known at the bank. *Held*, that, it not appearing that the bank had taken any action,

¹ *First Nat. Bank v. Tappan*, 6 Kan. 456; 7 Am. Rep. 568.

² *Bank of St. Albans v. Bank*, 10 Vt. 141; 33 Am. Dec. 189.

or lost any right by the depositor's assent to the account, he was not precluded from recovering from the bank the amount of the forged checks: *Weisser v. Denison* 10 N. Y. 68; 61 Am. Dec. 731. A bank paid a check to D., and four days afterwards, discovering evidence that it was forged, sent it to D.'s office, where D.'s clerk replaced it by a check signed in blank by D., and filled out by D.'s clerk. On the messenger's return, D., who was present with the cashier, took the check in his hands, and expressed no dissent to the substitution, but later in the day, denied his clerk's authority to issue it, tendered back the other check, stopped payment of his own, and demanded its return. *Held*, that the surrender of the other was a sufficient consideration for the issue of D.'s check, and his ratification was irrevocable: *Charles River Nat. Bank. v. Davis*, 100 Mass. 413. The owners of a deposit in bank signed several checks drawn payable to blank or order, and left them with their book-keeper, to be filled up and sent by mail to several parties living at a distance, for the payment of debts owed to them severally. The book-keeper handed these checks to a clerk, to be filled up with the proper dates, names, and amounts, leaving them payable to the order of the several creditors. The clerk did so, and then returned them to the book-keeper, who examined them, found them correct, stamped them, canceled the stamps, placed them with the accounts to be paid by them in envelopes, sealed the envelopes, and addressed them to the proper persons. The sealed letters were delivered to the clerk to carry to the post-office. He opened the letters and took out the checks surreptitiously, and, by the erasure of the words "or order," and inserting the words "or bearer," obtained the money from the bank. *Held*, that the bank was not protected in making the payment, but was liable to the depositors for the amount of the deposit: *Belknap v. National Bank*, 100 Mass. 376; 97 Am. Dec. 105. A obtained bank notes of a bank by means of a forgery, and exchanged them for other bank notes with another bank and individuals. *Held*, that the bank imposed on by the forgery was entitled to the last-mentioned bank notes, which were in A's possession, and had been received by him as its property: *Coffin v. Anderson*, 4 Blackf. 395. G. drew a check on a bank payable to C., B. indorsed the check without authority from C., and drew the money on it from the bank. The check was charged by the bank against G., and returned canceled to him. C. obtained the canceled check from G. and presented it to the bank for payment, which was refused. *Held*, that C. could recover the amount of the check from the bank: *Seventh Nat. Bank v. Cook*, 73 Pa. St. 483; 13 Am. Rep. 751. B presented a check to the bank on which it was drawn after banking hours, and the cashier

told him they would pay it during banking hours. Relying on this, B advanced the amount to the payee and took the check. The bank paid the check the next day. Subsequently, discovering that it had been fraudulently raised, the bank sued B to recover the amount so paid. *Held*, that they were entitled to recover, although B was ignorant of the forgery: *Parke v. Roser*, 67 Ind. 500. 33 Am. Rep. 102. Bank A, in entire innocence and without suspicion of forgery, received in course of business a forged check on deposit for \$4,600.15, purporting to be drawn upon bank B by one of the latter's customers; bank A sent it through the regular channel of communication for payment to B, upon which the law cast the duty and obligation of knowing the maker's signature; A adopted it as genuine, and actually paid it to B, and after such recognition and payment, and on the faith thereof, A paid over \$4,500 to the one who deposited the forged check, and who drew against his deposit for that amount; B sues A to recover the whole amount, \$4,600.15, refunded by B to B's real depositor after the forgery was discovered. *Held*, that A is not liable for the \$4,500 paid out by it, but is liable for the \$100.15 left to the credit of the one who deposited the forged check: *Commercial etc. Bank v. Bank*, 30 Md. 11; 96 Am. Dec. 555. Plaintiff, being the owner of a certificate of indebtedness of the United States, indorsed it in blank and mailed it to a pay-master. It was stolen from the mail and presented to a pay-master by the thief, who represented himself to be plaintiff and requested a check, saying that he could identify himself at the bank. The pay-master accordingly gave him a check payable to plaintiff's order on defendant bank. The bank paid the check to the bearer without inquiry, on the forged indorsement of the plaintiff's name. The pay-master, with notice of plaintiff's claim, subsequently lifted the check, and was charged with its amount in his settlement with the bank. *Held*, 1. That plaintiff's claim against the defendant bank was not affected by the pay-master's negligence in not requiring the person to whom the check was given to identify himself; 2. That plaintiff's claim was not affected by the subsequent settlement of the pay-master with the bank; and 3. That plaintiff could ratify the giving of the check in his name, thus making it his own, and maintain an action against the bank for the amount: *Dodge v. National Ex. Bank*, 20 Ohio St. 234; 5 Am. Rep. 648. Plaintiff's book-keeper forged plaintiff's signature to a check on defendant's bank, which was paid. On hearing of the fact, plaintiff ratified the act and retained the book-keeper in his employ. He afterward again forged plaintiff's signature to a check, which defendant paid and deducted from plaintiff's deposit. *Held*, that plaintiff had helped to mislead the bank and

could not recover the amount: *De Feriet v. Bank*, 23 La. Ann. 310; 8 Am. Rep. 597. A deposited money in a bank, and afterwards drew checks for the amount in favor of B. & Co. or order. The bank paid the checks, they having the name of B. & Co. written on the back. A brought an action against the bank for the money he had deposited. The bank pleaded payment. The plaintiff proved that the name of B. & Co. on the checks was not in the handwriting of either of the members of the firm, and that they never owned nor had any interest in the checks. *Held*, that the plaintiff was entitled to recover: *Morgan v. New York State Bank*, 11 N. Y. 404.

§ 535. Certificates of Deposit.—A certificate of deposit issued by a bank is a receipt representing money left with it for safe-keeping, and payable to the depositor on demand,¹ or to his order.² And it may be payable at a future date or carry interest.³ Where it was by its terms payable at a specified date “on the return of the certificate,” it was held that it was payable at the place where the bank was located, and that an action thereon should be prosecuted there, and not where the banker might happen to reside.⁴ If payable to the order of the depositor, but indicating no time of payment other than can be inferred from the words “interest at the rate of seven per cent on call, and ten per cent per annum,” it is payable on demand, and therefore due immediately; and *bona fide* holders are affected with the equities existing between parties prior to themselves.⁵

¹ *Hotchkiss v. Mosher*, 48 N. Y. 478; *Nat. Bank v. Wash. Co. Bank*, 5 Hun, 605; *Payne v. Gardiner*, 29 N. Y. 146; *First Nat. Bank of Union Mills v. Clark*, 42 Hun, 16; *Brown v. McElroy*, 52 Ind. 414; *Meador v. Dollar Sav. Bank*, 56 Ga. 605.

² *Daniel on Negotiable Instruments*, sec. 698.

³ *Hunt Appellant*, 141 Mass. 515; *Miller v. Austen*, 13 How. 218; *Kilgore v. Bulkley*, 14 Conn. 363; *Patterson v. Poindexter*, 6 Watts & S. 227; *London Sav. Fund Ass'n v. Hagerstown Sav. Bank*, 36 Pa. St. 498; *Cate v. Patterson*, 25 Mich. 191;

Laughlin v. Marshall, 19 Ill. 350; *Howe v. Hartness*, 11 Ohio St. 449; 2 *Daniel on Negotiable Instruments*, secs. 698, 1707 a; *Story on Promissory Notes*, sec. 12 u. Where a bank is prohibited from issuing any bill or note except payable on demand, a certificate of deposit made by it, payable six months after date, with interest, is void; *Bank of Orleans v. Merrill*, 2 Hill, 295; *Bank of Chillicothe v. Dodge*, 8 Barb. 237; *Leavitt v. Palmer*, 3 N. Y. 19; 51 Am. Dec. 333.

⁴ *Sanbourn v. Smith*, 44 Iowa, 152.

⁵ *Meador v. Dollar Savings Bank*, 56 Ga. 605.

It is, when expressed in proper form,¹ a negotiable promissory note.² It is a promissory note payable on demand, and is dishonored after the lapse of a reasonable time from its issue, and any person taking it after such reasonable time has elapsed takes it subject to the equities between the parties to it.³ Where the owner of a certificate of deposit has indorsed it, and carelessly allowed it to pass beyond his control, one who, within a reasonable time, purchases it in good faith and for value is entitled to protection.⁴ The placing of one's name (not a party) on the back of a certificate of deposit makes him *prima facie* a guarantor,⁵ whether the certificate is negotiable or not.⁶ A certificate by the agent of an unincorporated banking company that "M. had deposited with him \$430 in tickets on deposit, subject to him only on the return of the certificate," imports on its face no liability of the company.⁷ In New York and other states it is held that before an action can be brought on a certificate of deposit a demand is necessary.⁸ But in other states it

¹ See Title Negotiable Instruments as to requisites of negotiability as to form.

² *Pardee v. Fish*, 60 N. Y. 265; 19 Am. Rep. 176; *Miller v. Austen*, 13 How. 218; *Kilgore v. Bulkley*, 14 Conn. 362; *Cate v. Patterson*, 25 Mich. 191; *Brummagin v. Tallant*, 29 Cal. 503; 89 Am. Dec. 61; *Drake v. Markle*, 21 Ind. 433; 83 Am. Dec. 358; *Fells Point Sav. Inst. v. Weedon*, 18 Md. 320; 81 Am. Dec. 603; *Welton v. Adams*, 4 Cal. 37; 60 Am. Dec. 579; *Nat. Bank v. Ringel*, 51 Ind. 393; *Johnson v. Henderson*, 76 N. C. 227; *Poorman v. Mills*, 35 Cal. 118; 95 Am. Dec. 90; *Gregg v. Union Bank*, 87 Ind. 238; *Brown v. McElroy*, 52 Ind. 404; *Lynch v. Goldsmith*, 64 Ga. 42; *Hart v. Life Ass'n*, 54 Ala. 495; *contra*, *O'Neill v. Bradford*, 1 Pinn. 390; 42 Am. Dec. 575. A certificate of deposit in a certain form has been held not to be a promissory note within the meaning of a statute which provides that, in any action by an indorsee against the promisor upon a promis-

sory note payable on demand, any matter shall be deemed a legal defense which would be a defense to a suit thereupon if brought by the promisee: *Shute v. Pacific Bank*, 136 Mass. 487. But a certificate of deposit payable to order on return of the certificate properly indorsed is, in legal effect, a promissory note payable on demand, and is dishonored upon the lapse of a reasonable time after its issue: *Tripp v. Curtenius*, 36 Mich. 494; 24 Am. Rep. 610.

³ *Tripp v. Curtenius*, 36 Mich. 494; 24 Am. Rep. 610.

⁴ *Birch v. Fisher*, 51 Mich. 36.

⁵ *Fuller v. Scott*, 8 Kan. 25; *Firman v. Blood*, 2 Kan. 496.

⁶ *Jones v. Kuhn*, 34 Kan. 414.

⁷ *Lake v. Munford*, 12 Miss. 312.

⁸ *Pardee v. Fish*, 60 N. Y. 265; 19 Am. Rep. 176; *Munger v. Bank*, 85 N. Y. 580; *Payne v. Gardiner*, 29 N. Y. 171; *Smiley v. Fry*, 100 N. Y. 262; *Fells Point Sav. Inst. v. Weedon*, 18 Md. 320; 81 Am. Dec. 603; *Bellows Falls Bank v. Rutland Co. Bank*, 40 Vt. 377.

is held that, like the maker of a note, the bank is bound to find the payee, and no demand is necessary.¹ If the holder, having commenced a suit thereon, surrenders the certificate and takes new ones, the action cannot be maintained on them.² A certificate of deposit assigned after suspension and closing of a savings institution, but before the filing of the bill for winding up its affairs as an insolvent corporation, is a valid off-set in favor of the assignee against a debt owing by him to the former.³

ILLUSTRATIONS. — An instrument was in this form: "Philadelphia, May 21, 1864. Due S. K. Ashton, M. D., trustee, four thousand dollars, returnable on demand. It is understood this sum is especially deposited with us, and is distinct from the other transactions with said Ashton. J. R. & H. B. Fry." *Held*, that the instrument was a certificate of deposit, and that the statute of limitations did not begin to run thereon until demand was made: *Smiley v. Fry*, 100 N. Y. 262. A certificate of deposit bore the following words written in red ink across the face: "The certificate is subject to any subsequent claim for collection, or any other fees arising out of the disbursement of the legacy of which this money is part of proceeds." The payee indorsed it in blank and delivered it. *Held*, that, even considering the certificate non-negotiable, the transferee might pledge it to an innocent party who would hold it against the true owner, to the amount advanced, unaffected by the equities between the transferor and the payee: *International Bank v. German Bank*, 71 Mo. 183; 36 Am. Rep. 468. By a mistake made in filling up the body of the certificate, a larger sum than intended is inserted. A *bona fide* holder is entitled to recover the larger sum so inserted: *Poorman v. Mills*, 39 Cal. 345; 2 Am. Rep. 451. A bank issued a certificate of deposit to a person who could not read or write. The certificate was stolen and was paid by another bank, which forwarded it to the bank of issue, where it was paid. Subsequently, upon discovering that the indorsement was a forgery, the bank issuing the certificate sued the bank which forwarded it for the amount so paid. *Held*, that it was entitled to recover: *State National Bank v. Freedmen's Saving Co.*, 2 Dill. 11. Defendant sent plaintiff a certificate of deposit payable on demand, in payment of a debt. Plaintiff received and acknowledged the receipt thereof, and used and

¹ *Tripp v. Curtanius*, 36 Mich. 497; 24 Am. Rep. 610; *Brummagin v. Talant*, 29 Cal. 503; 89 Am. Dec. 61.

² *Manuel v. R. R. Co.*, 2 Pa. St. 198.
³ *Moseby v. Williamson*, 5 Heisk. 278.

negotiated the certificate for fifteen days, when the bank issuing the certificate failed, and it was presented and protested. Mail communication between plaintiff and the bank occupied but two days. *Held*, that plaintiff had not used due diligence, and could not recover from defendant: *Bower v. Hoffman*, 23 Md. 263; 87 Am. Dec. 569. Plaintiff handed a sum of money over the counter of a bank to its teller, stating he desired to leave it on deposit with the bank. The teller gave him a certificate, which was in form an acknowledgment that he had deposited the money with a third person, and contained a personal obligation on the part of the latter to repay the amount. The latter was the president of the bank, and the certificate was signed by him, but not in his official capacity; nor was the bank in any way named therein. Plaintiff did not read the certificate when he received it. In an action against the bank to recover the amount of the deposit, *held*, that plaintiff was not precluded by the certificate; that the doctrine of constructive notice of its contents, from the fact of possession thereof, did not apply, and that it was a question of fact whether the deposit was with the defendant or its president individually: *Coleman v. First Nat. Bank*, 53 N. Y. 388. A bank ordered for A goods from plaintiff. A could not pay at the time, and the cashier took paper and sent to plaintiff a certificate of deposit, regular in form, except that it appeared to be signed by the cashier personally, and not officially. *Held*, that the bank was liable on it: *Crystal Plate Glass Co. v. Livingston Bank*, 6 Mont. 303.

§ 536. **Bank Bills.**—A bank note or bank bill is the promissory note of the bank payable on demand.¹ They are negotiable at common law, and independent of the statutes rendering promissory notes negotiable.² Bank notes are not money,³ though they may pass current as such by tacit consent,⁴ and for every purpose in the ordinary transaction of business, bank notes are considered as money.⁵ Current bank notes are such as are converti-

¹ Bouvier's Law Dict. 187.

² New Hope etc. Bridge Co. v. Perry, 11 Ill. 467; 52 Am. Dec. 443.

³ Governor v. Carter, 3 Hawks, 328; 14 Am. Dec. 588; Morrill v. Brown, 15 Pick. 173.

⁴ Pierson v. Wallace, 7 Ark. 282; Bank of U. S. v. Bank of Georgia, 10 Wheat. 333; Bradley v. Hunt, 5 Gill & J. 58; 23 Am. Dec. 597; Handy v.

Dobbin, 12 Johns. 220; Farmers' etc. Bank v. White, 2 Sneed, 482; 64 Am. Dec. 772. They will pass under the word "money" in a will: Chapman v. Hart, 1 Ves. Sr. 271.

⁵ Morris v. Edwards, 1 Ohio, 189; Edwards v. Morris, 1 Ohio, 524; Bradley v. Hunt, 5 Gill & J. 58; 23 Am. Dec. 597; Morrill v. Brown, 15 Pick. 177.

ble into specie at the counter where they were issued and pass at par in the ordinary transactions of the country.¹ Notes issued by bank organized under an unconstitutional law are void, and constitute no consideration for a promissory note.² Issuing promises "to pay bearer, on demand, fifty cents in goods" is not a violation of act of Congress which forbids issuing notes for a less sum than one dollar intended to circulate as money.³ The circulating notes of a national banking association are valid contracts without having the imprint of the seal of the treasury on them.⁴ Although a note given by a banking association is not such a one as could be lawfully issued for circulation as money, it will be *prima facie* evidence of an indebtedness lawfully incurred by the bank for some purpose incidental to its legitimate business.⁵ Under the Pennsylvania act of 1842, which declares that the refusal of the state banks to redeem their notes, etc., in gold and silver coin, shall be taken to be an absolute forfeiture of their respective charters, the refusal of a bank to pay in specie its own notes, presented to it by a person who is the debtor of the bank to a greater amount, does not amount to a forfeiture of the charter.⁶ They may be made by statute a legal tender in payment of debts due the bank, in which case a debtor may set them off against a claim upon him,⁷ but not against a judgment.⁸ A bank is legally bound to take its own bills in payment of debts due to it.⁹ The debtors of an insolvent bank are entitled to pay the bank in its own notes.¹⁰ And the bank cannot

¹ Pierson v. Wallace, 7 Ark. 232.

² Skinner v. Deming, 2 Ind. 558; 54 Am. Dec. 463.

³ United States v. Van Anken, 96 U. S. 366.

⁴ United States v. Bennett, 17 Blatchf. 357.

⁵ Parmlly v. Tenth Ward Bank, 3 Edw. Ch. 395.

⁶ Long v. Farmers' Bank, 1 Pa. L. J. 284.

⁷ Moise v. Chapman, 24 Ga. 249;

Com. Bank v. Thompson, 7 Smedes & M. 443; Tillon v. Britton, 9 N. J. L. 120; Diven v. Phelps, 34 Barb. 224; Am. Bank v. Wall, 56 Me. 167; Bank of Pa. v. Spangler, 32 Pa. St. 474.

⁸ Thorp v. Wegefath, 56 Pa. St. 82; 93 Am. Dec. 789.

⁹ Niagara Bank v. Rosevelt, 9 Cow. 409.

¹⁰ Union Bank v. Ellicott, 6 Gill & J. 363.

by an assignment of its effects deprive its debtor of this right.' The fact that bank notes are below par does not render their circulation illegal; but the bank must pay the face of them to the holder, although he took them below par.² A bank holding the bank bills of another bank, and demanding payment of the same at the banking house of the latter, is not bound to receive its own bills in payment, but may demand specie.³ The mere receipt by the officers of a new bank of the bills of an old bank of the same name, and their paying out the same bills, does not make the new bank responsible to pay all the bills of the old bank.⁴ Where a new bank was incorporated with the same name as an old one, whose charter was expiring, the new bank was held not to be responsible for the notes of the old, though a major part of the stockholders were the same in each.⁵

In the absence of circumstances excusing a demand,⁶ a cause of action does not accrue on bank bills until a demand and refusal.⁷ But there is no necessity for a demand upon each separate bill; one demand in the aggregate upon a package of bills is sufficient.⁸

It is the duty of the bank to redeem its bills with reasonable dispatch,⁹ and unreasonable delay amounts to a refusal of payment.¹⁰ Whether there was unreasonable

¹ *Blount v. Windley*, 68 N. C. 1; 12 Am. Rep. 616.

² *Robison v. Beall*, 26 Ga. 17.

³ *Suffolk Bank v. Lincoln Bank*, 3 Mason, 1.

⁴ *Wyman v. Hallowell and Augusta Bank*, 14 Mass. 58; 7 Am. Dec. 194; *Bollows v. Hallowell and Augusta Bank*, 2 Mason, 31. And see *Bank of United States v. Davis*, 2 Hill, 451.

⁵ *Bollows v. Hallowell etc. Bank*, 2 Mason, 31.

⁶ *Nashville Bank v. Henderson*, 5 Yerg. 104; 26 Am. Dec. 257; *Bryant v. Bank*, 18 Me. 240. As the closing of the doors of a bank: *Thurston v. Bank*, 18 N. H. 391; 45 Am. Dec. 382. Post-notes of a bank are payable on demand made at any time during bank-

ing hours on the last day of grace; and if payment is not made, an action may properly be commenced on the same day: *Staples v. Bank*, 1 Met. 43; 35 Am. Dec. 345.

⁷ *National Bank v. Wash. Co. Bank*, 5 Hun, 605; *Crawford v. Bank*, Phill. (N. C.) 136; *Thurston v. Bank*, 18 N. H. 391; 45 Am. Dec. 382.

⁸ *Reapers' Bank v. Willard*, 24 Ill. 433; 76 Am. Dec. 755; *Suffolk Bank v. Lincoln Bank*, 3 Mason, 1. But see *Boatman's Sav. Inst. v. Bank of Missouri*, 33 Mo. 497; 84 Am. Dec. 61.

⁹ *Suffolk Bank v. Lincoln Bank*, 3 Mason, 1.

¹⁰ *Reapers' Bank v. Willard*, 24 Ill. 439.

delay in payment must depend on the circumstances of the case. Banks should have sums counted, or sufficient servants to count them, so that a demand of ordinary magnitude may be paid within the banking hours of the day; and the fact that demands for specie are made as the result of a combination to create a run upon the bank does not excuse the bank from diligence in paying out specie.¹ No bank has a right to unnecessarily delay a bill-holder by paying him in ten-cent pieces, and stopping to count them. This is not a reasonable performance;² nor, it would seem, in quarter-dollars.³ If the total and absolute destruction of a bank note is clearly established, the bank is bound to pay the last holder or owner the amount of it.⁴ And where the holder of a bank note divides it, for the purpose of transmission by mail, and loses one half, he may recover the amount of the whole note;⁵ but no other person can recover on the other half.⁶ A custom of a bank not to pay any of its bills voluntarily cut in two without the production of both parts,⁷ or to pay but one half the face value of the bill, is irrelevant.⁸ The bank is liable for its bills which are destroyed, after being put in circulation, by fire.⁹ The mutilation of bank notes by time or accident, or

¹ *Hubbard v. Chenango Bank*, 8 Cow. 88.

² *Reapers' Bank v. Willard*, 24 Ill. 439.

³ *People v. Dubois*, 18 Ill. 333.

⁴ *Hagerstown Bank v. Adams' Ex. Co.*, 45 Pa. St. 419; 84 Am. Dec. 499; *Bank of Louisville v. Summers*, 14 B. Mon. 306; *Bank of Mobile v. Meagher*, 33 Ala. 622; *Tower v. Appleton Bank*, 3 Allen, 387; 81 Am. Dec. 665; *Irwin v. Planters' Bank*, 1 Humph. 145; *Ross v. Bank*, 1 Aiken, 43; 15 Am. Dec. 664.

⁵ *Com. Bank v. Benedict*, 18 B. Mon. 307; *United States Bank v. Sill*, 5 Conn. 106; 13 Am. Dec. 44; *Allen v. State Bank*, 1 Dev. & B. Eq. 3; *Union Bank v. Warren*, 4 Sneed, 167; *Armat v. Bank*, 2 Cranch C. C. 180; *Bullet v.*

Bank, 2 Wash. C. C. 172; *State Bank v. Aersten*, 4 Ill. 135; 36 Am. Dec. 536; *Patton v. State Bank*, 2 Nott & McC. 464; *Mayor v. Johnson*, 3 Camp. 324; *Redmayne v. Burton*, 2 L. T., N. S., 324.

⁶ *Hinsdale v. Bank of Orange*, 6 Wend. 378; *Bank of Virginia v. Ward*, 6 Munf. 166; *Martin v. Bank of U. S.*, 4 Wash. C. C. 253; *Murdock v. Union Bank*, 2 Rob. (La.) 112; 38 Am. Dec. 197.

⁷ *Bank of United States v. Sill*, 5 Conn. 106; 13 Am. Dec. 44.

⁸ *Allen v. State Bank*, 1 Dev. & B. Eq. 3.

⁹ *Wade v. New Orleans Canal and Banking Co.*, 8 Rob. (La.) 140; 41 Am. Dec. 297.

the alteration of the numbers, will not prevent a recovery by the holder if enough remains to identify them.¹ But the owner of bank bills incapable of being distinguished from other similar bills cannot maintain an action against the bank that issued them upon merely circumstantial evidence that they have been destroyed and the tender of a bond of indemnity.² An action upon bank bills which had been stolen from the bank cannot be defeated by proof that the bills were protested before the plaintiff purchased them, and that he obtained them at a discount.³ A bank is bound to know its own paper, and the receipt by it of forged notes purporting to be its own must be deemed an adoption of them.⁴ If a bank bill completely executed in every material respect be stolen from the bank and fraudulently circulated, it is good as against the bank in the hands of a *bona fide* holder for value;⁵ but not where they are stolen before they are signed by the president and his signature forged.⁶ One who receives from a bank, in payment of a check, a counterfeit United States treasury note can recover of the bank the amount of the note, provided he offers to return it within a reasonable time after discovering the forgery.⁷ If a bank receives the forged notes of other banks upon general deposit, and credits the depositor therefor at the time, a debt from the bank to him is not thereby created,⁸ as would be the case if the notes were genuine,⁹ or were forged notes purporting to be its

¹ Note-holders of the Bank of Tennessee v. Board, 16 Lea, 46; 57 Am. Rep. 211.

² Tower v. Bank, 3 Allen, 387; 81 Am. Dec. 665.

³ Olmstead v. Winsted Bank, 32 Conn. 278; 85 Am. Dec. 260.

⁴ Third Nat. Bank v. Allen, 59 Mo. 310; Bank of United States v. Bank of Georgia, 10 Wheat. 333.

⁵ Salem Bank v. Gloucester Bank, 17 Mass. 1; 9 Am. Dec. 111; Gloucester Bank v. Salem Bank, 17 Mass. 33;

Worcester Co. Bank v. Dorchester Bank, 10 Cush. 488; 57 Am. Dec. 120.

⁶ Salem Bank v. Gloucester Bank, 17 Mass. 1; 9 Am. Dec. 111.

⁷ Boyd v. Mexico Southern Bank, 67 Mo. 537; 29 Am. Rep. 515.

⁸ Third Nat. Bank v. Allen, 59 Mo. 310; Cabot Bank v. Morton, 4 Gray, 156; Coffin v. Anderson, 4 Blackf. 395.

⁹ Boyden v. Bank of Cape Fear, 65 N. C. 13; Bank of Republic v. Millard, 10 Wall. 152.

own.¹ The rule of *caveat emptor* applies to the purchase of depreciated bank bills by a banker or broker who deals in such bills as an article of commerce; and if a bill purchased by him, after ample opportunity to examine it and satisfy himself as to its value, turns out to be worth less than the price paid for it, the vendor is not bound to make it good.² The holder of stolen bank bills who came by them in good faith for a valuable consideration, and in the regular course of business, can recover upon them against the bank. But the *bona fide* holder of stolen bank bills, received in the regular course of business and for a valuable consideration, does not acquire an absolute property therein which he can transmit to a purchaser who has knowledge that the bills were stolen, or were claimed to have been stolen from and not issued by the bank.³ Where a party exchanges notes of a broken bank for those of a solvent one, the loss must fall on him, both parties being ignorant of the failure at the time of the exchange.⁴ The face of bank bills that circulate as money is not evidence of the date of their issue, they being constantly paid into bank and reissued. The statute of limitations, in its ordinary acceptation, does not apply to them.⁵ No action will lie by one bank against another for collecting its bills, and presenting them for payment in a harassing manner with a malicious intent to injure its credit.⁶

ILLUSTRATIONS.—Notes issued by a bank had been sent to it through an express company, and, while in transit, a part were stolen by an agent, who destroyed them after the amount had been paid to the bank by the company. *Held*, that the property in the notes was transferred by that payment to the company, and then, on proving the destruction, were entitled to recover the

¹ Bank of United States v. Bank of Georgia, 10 Wheat. 333; Third National Bank v. Allen, 59 Mo. 310.

² Hinckley v. Kersting, 21 Ill. 247; 74 Am. Dec. 102.

³ Olmstead v. Bank, 32 Conn. 278; 85 Am. Dec. 261.

⁴ Frontier Bank v. Morse, 22 Me. 88; 38 Am. Dec. 284.

⁵ Long v. Yanceyville Bank, 81 N. C. 41.

⁶ South Royalton Bank v. Suffolk Bank, 27 Vt. 505.

amount from the bank: *Hagerstown Bank v. Adams Express Co.*, 45 Pa. St. 419; 84 Am. Dec. 499. A bank charter authorized the corporation to issue bills, "provided the same be signed by the president and countersigned by the cashier of said corporation," adding, "the funds of said corporation shall in no case be liable for any contract or engagement whatever unless the same be signed and countersigned as aforesaid." *Held*, that the bank was not liable on bills signed by the vice-president and countersigned by the assistant cashier: *Planters' etc. Bank v. Erwin*, 31 Ga. 371. The plaintiff demanded one thousand dollars; the teller, with more than ten thousand dollars specie in boxes, commenced by selecting the small pieces to make payment with. The plaintiff offered to take a box at the bank-mark, but such offer was refused, and the teller was unable to count one thousand dollars in the four business hours of the day, so that the demand could not be paid on the day made. *Held*, a refusal to pay on demand: *Hubbard v. Bank*, 8 Cow. 88. A person having a large amount in bills of the bank at Ann Arbor presented them at the counter of the bank for payment. The mode pursued by the officers of the bank when a packet of bills was presented was to take up one at a time, examine it, get from a table the requisite amount of specie, and pay it, and so proceed until banking hours had expired, and then refuse to make any more redemptions on that day. The bank refused to employ more than one person to count and redeem the money. *Held*, that the conduct of the bank was evasive, and amounted to a refusal to redeem: *People v. State Treasurer*, 4 Mich. 27. The owner of a bank bill accidentally tore it into two nearly equal parts, one of which, containing no words giving it a negotiable character, was lost. The bank, on demand being made upon it for the amount of the mutilated bill, refused payment until indemnified by the owner against the loss which would ensue to it from the refusal of the bank department to issue a new bill, or to retransfer so much of its security as was pledged for the redemption of its circulation. *Held*, that the bank was liable for the amount of the note: *Martin v. Blydenburg*, 1 Daly, 314.

§ 537. Authority of Banker—How Terminated.—The authority of a banker to pay a check drawn on him by a customer is determined by actual notice by the customer not to do so, or by notice of the customer's death¹ or

¹ *Rogerson v. Ladbrooke*, 1 Bing., N. S., 93; *Daniel on Negotiable Instruments*, sec. 1618.

bankruptcy.¹ The general power of a bank to collect ceases by its suspension as to paper previously deposited therewith.²

ILLUSTRATIONS.—A bank was notified by the drawer of a check not to pay it, and the paying teller promised not to do so, but afterwards paid it to the holder on presentation. *Held*, that the drawer might recover from the bank the amount of the check so paid: *Schneider v. Irving Bank*, 1 Daly, 500; 30 How. Pr. 190.

¹ *Vernon v. Hankey*, 2 Term Rep. 113.

² *Jockusch v. Towsey*, 51 Tex. 129.

PART III. — RAILROAD COMPANIES.¹

CHAPTER XXX.

RAILROAD COMPANIES.

- § 538. Railroad corporation — A *quasi* public one.
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¹ As to the powers and liabilities of railroad corporations generally, see Division I., Title Corporations, *ante*. As to railroad companies as carriers of goods and passengers, see Division III., Bailments — Common Carriers. As to their liability for negligence, see Division II., Negligence; Division III., Animals. As to taking property by and the public regulation of railroads, see Division V., Constitutional Law — Eminent Domain.

§ 538. **Railroad Corporation — A Quasi Public One.** — As to the stockholders, a railroad is a private corporation,¹ but as it respects the powers of the legislature to regulate it or to authorize the taking of private property for public use, it is a *quasi* public corporation.² In the eye of the law, railroads are modern public highways, created to serve public uses; and for public purposes enjoy privileges and franchises, which partake of the nature of sovereignty.³ Railroads constructed under a general railroad law become, *ipso facto*, public, because the public have the right of passage thereon by paying reasonable and uniform tolls; and this, regardless of the motives of their projectors or the generality of their probable use.⁴ In the grant of the franchise there is an implied condition that it is held as a *quasi* public trust.⁵ A railroad is a public work to which the aid of the state may be properly given;⁶ and in this respect there is no distinction made between a road built by private capital, and owned by individuals, and one owned by the public itself.⁷ The state may limit the amount of charges by railroad companies for fares and freights, unless restrained by some contract in the charter, even though their income may have been pledged as security for the payment of obligations incurred upon the faith of the charter.⁸ Railroad corporations hold their property and exercise their

¹ *Stevens v. R. R. Co.*, 29 Vt. 545; and see *Ohio etc. R. R. Co. v. Ridge*, 5 Blackf. 78; *Alabama etc. R. R. Co. v. Kidd*, 29 Ala. 221; *Trustees etc. v. R. R. Co.*, 3 Hill, 567, 570; *Petition of Mt. Wash. Road Co.*, 35 N. H. 134.

² *Stevens v. R. R. Co.*, 29 Vt. 545; *Stockton etc. R. R. Co. v. Stockton*, 41 Cal. 147; *Swan v. Williams*, 2 Mich. 424; *Bradley v. R. R. Co.*, 21 Conn. 294; *Sharpless v. Mayor*, 21 Pa. St. 147; 59 Am. Dec. 759.

³ *Davidson v. County Commissioners*, 18 Minn. 482.

⁴ *National Docks R. R. Co. v. R. R. Co.*, 32 N. J. Eq. 755.

⁵ *Messenger v. R. R. Co.*, 37 N. J. L.

531; 18 Am. Rep. 754. See *Aikin v. R. R. Co.*, 20 N. Y. 370; *State v. R. R. Co.*, 25 Vt. 433.

⁶ *Davidson v. County Commissioners*, 18 Minn. 482; *Leavenworth County v. Miller*, 7 Kan. 479; *Stockton etc. R. R. Co. v. Stockton*, 41 Cal. 147; *Chicago etc. R. R. Co. v. Smith*, 62 Ill. 268.

⁷ *Gibson v. Mason*, 5 Nev. 283; and see *Donnager v. State*, 8 Smedes & M. 649.

⁸ *Munn v. Illinois*, 94 U. S. 113; *Chicago etc. R. R. Co. v. Iowa*, 94 U. S. 155; *Peik v. R. R. Co.*, 94 U. S. 164, 176.

functions for the public benefit, and they are therefore subject to legislative control. The legislature which has created them may regulate the mode in which they shall transact their business, the price which they shall charge for the transportation of freight and passengers, the speed at which they may run their trains, and the way in which they may cross or run upon highways and turnpikes used for public travel. It may make all such regulations as are appropriate to protect the lives of persons carried upon railroads or passing upon highways crossed by railroads. All this is within the domain of legislative power, although the power to alter and amend the charters of such corporations has not been reserved.¹

§ 539. **Grant of Franchise.**—The franchises of railroad corporations are those positive rights and privileges the possession of which are essential to its operation and the successful working of its road, such as the right to take tolls, to run cars, to appropriate earth and gravel for its road-beds, or water for its engines, etc., and which constitute a component and necessary part of the value of the road and its works. A railroad franchise also includes the right to appropriate strips of land necessary for the construction of buildings and works requisite and indispensable to the successful operation of the road.² A railroad franchise, though it may be granted to an individual, is usually granted to a corporation.³ The charter of a railroad company cannot be attacked collaterally for bad faith in obtaining it.⁴

§ 540. **Franchise — How Construed.**—Railroad charters are strictly construed.⁵ A legislative grant of au-

¹ *People v. R. R. Co.*, 70 N. Y. 569.

² *Lawrence v. Steamship Co.*, 39 La. Ann. 427; 4 Am. St. Rep. 265.

³ *New York etc. R. R. Co. v. R. R. Co.*, 32 How. Pr. 481; *Bank of Middlebury v. Edgerton*, 30 Vt. 182; *Denver etc. R. R. Co. v. R. R. Co.*, 2 Col.

673; *O'Connor v. Pittsburg*, 18 Pa. St. 187; *Franklin Bridge Co. v. Wood*, 14 Ga. 80. See *ante*, Part I., Corporations.

⁴ *Garrett v. R. R. Co.*, 78 Pa. St. 465.

⁵ *Newhall v. R. R. Co.*, 14 Ill. 273; *Parker v. R. R. Co.*, 7 Man. & G. 253;

thority to a railroad company to "extend" their road contemplates that one terminus of the extension shall be at some point on the road already built, and does not authorize the construction of a separate and independent road.¹

§ 541. **When and when not Exclusive.**—If the grant to a railroad is not exclusive in its terms, the legislature is not precluded from granting other charters to similar corporations, which may essentially interfere with the operations of the former;² or under the power of eminent domain, the legislature may even take one or more of the franchises of the former upon making due compensation.³ Where monopolies are not prohibited by the constitution, the legislature may grant exclusive privileges to a railroad.⁴ A provision in the charter of a railroad which authorizes "all railroad companies upon equal terms to run their locomotives and cars over the tracks of" the railroad chartered does not authorize the building of lateral railroads in every direction connecting with other railroads.⁵

§ 542. **Cannot be Assigned — Or Levied on.**—The franchise in a railroad is a mere easement, and cannot be sold or assigned without legislative authority;⁶ nor is it, in

¹ Scott N. R. 835; Wilmington etc. R. R. Co. v. Reid, 64 N. C. 226; Bowling Green etc. R. R. Co. v. Warren Co. Court, 10 Bush, 711; Richmond R. R. Co. v. R. R. Co., 13 How. 71; Commonwealth v. R. R. Co., 24 Pa. St. 159; 42 Am. Dec. 372. See *ante*, Part I., Corporations.

² Savannah etc. R. R. Co. v. Shiels, 33 Ga. 601.

³ Raritan etc. R. R. Co. v. Delaware etc. Canal Co., 18 N. J. Eq. 546; Turnpike Co. v. State, 3 Wall. 210; State v. Noyes, 47 Me. 189; Matter of Buffalo, 68 N. Y. 167; Tuckahoe Canal Co. v. R. R. Co., 11 Leigh, 42; 36 Am. Dec. 375; Baltimore etc. R. R. Co., 45 Md. 596.

⁴ Matter of Kerr, 42 Barb. 119; New York etc. R. R. Co. v. R. R. Co., 36 Conn. 196; and compare Little Miami etc. R. R. Co. v. Dayton, 23 Ohio St. 510; Matter of N. Y. etc. R. R. Co., 20 Hun, 201.

⁵ In re Philadelphia etc. R. R. Co., 6 Whart. 25; 36 Am. Dec. 203.

⁶ Baltimore etc. Turnpike Co. v. R. R. Co., 35 Md. 224; 6 Am. Rep. 397.

⁷ Arthur v. Commercial etc. Bank, 9 Smedes & M. 394; 48 Am. Dec. 719. See Bardstown etc. R. R. Co. v. Metcalfe, 4 Met. (Ky.) 199; 81 Am. Dec. 541; Cos v. R. R. Co., 10 Ohio St. 372; 75 Am. Dec. 518; East Boston Freight R. R. Co. v. R. R. Co., 13

ordinary cases, subject to levy and sale under execution.¹ But an assignment of a franchise can only be questioned by the state.² It cannot free itself from liability for negligence by an agreement of lease placing its employees and trains under the control of the manager of another railroad.³ The franchise of a railroad corporation is an incorporeal hereditament, not included within the term "lands or tenements," and a railroad is a public work, entitled and bound to use its franchise; therefore a proceeding of unlawful detainer does not lie to recover a part of such a public work.⁴

§ 543. Duration of.—The term of the franchise is fixed by the constitution in operation at the time of the grant, or by the terms of the grant itself.⁵

§ 544. When Railroad a Nuisance.—A railroad authorized by the legislature, and lawfully constructed and operated in an authorized place, cannot be adjudged a nuisance.⁶ If it is required by statute to blow the whistles of its locomotives on approaching crossings, it cannot be held guilty of a nuisance in doing so.⁷ If a railroad company, in constructing its road, transcend the authority constitutionally conferred by the legislature, the road is a nuisance, for which the company may be held liable in damages.⁸ An obstruction of a public crossing over a railroad is a nuisance; and the company is liable for all the consequences that may ensue from leaving a cross-

Allen, 422; Pullan v. R. R. Co., 4 Biss. 35. But see Kennebec etc. R. R. Co. v. R. R. Co., 59 Me. 23; Meyer v. Johnston, 53 Ala. 324.

¹ Stewart v. Jones, 40 Mo. 140; Randolph v. Larned, 27 N. J. Eq. 557.

² Arthur v. Com. etc. Bank, 9 Smedes & M. 394; 48 Am. Dec. 719.

³ Wabash etc. R. R. Co. v. Peyton, 106 Ill. 534; 46 Am. Rep. 705.

⁴ Gibbs v. Drew, 16 Fla. 147; 26 Am. Rep. 700.

⁵ Atlantic etc. R. R. Co. v. Allen, 15 Fla. 637.

⁶ Easton v. R. R. Co., 24 N. J. Eq. 49; Parrot v. R. R. Co., 10 Ohio St. 624. See post, Division III., Fires.

⁷ Pittsburg etc. R. R. Co. v. Brown, 67 Ind. 45; 33 Am. Rep. 73.

⁸ Commonwealth v. R. R. Co., 14 Gray, 93; Mahon v. R. R. Co., 24 N. Y. 658; McCandless's Appeal, 70 Pa. St. 210.

ing obstructed by a train of cars.¹ A railroad authorized to be built at one place, if built at other places is a mere nuisance on every highway it touches in its illegal course.² So if it carries on its authorized business in an unlawful way.³

§ 545. Location of Road.—All railroad charters must be taken to allow the exercise of such a discretion in the location of a route as is incident to an ordinary practical survey thereof, made with reference to the nature of the

¹ *Murray v. R. R. Co.*, 10 Rich. 227; 70 Am. Dec. 219.

² *Commonwealth v. R. R. Co.*, 27 Pa. St. 339; 67 Am. Dec. 47.

³ In *Louisville etc. R. R. Co. v. Commonwealth*, 13 Bush, 388, it was held that the neglect of a railroad to give warning or signals at crossings was a nuisance, although there was no statute requiring it, the court saying: "Although the appellant's charter authorizes it to operate its road by running trains thereon, and does not limit the speed at which they may be run, nor require it to ring a bell or blow a whistle at the crossings of public roads, it does not necessarily follow that to omit to give one of these signals, or to take other precautions to avoid injuring persons traveling on intersecting highways, is not a public offense. It is implied in every grant of corporate privileges that the grantee shall use reasonable and ordinary care and caution to avoid injuring individuals or the general public. If a business is, in its nature, hazardous to others, the law requires of those engaged in that business, whether they be natural or artificial persons, to use such care and caution in its prosecution as common prudence demands. If, as the jury has found, the safety of travelers crossing the appellant's road demands that warning should be given of the approach of trains, then it is appellant's duty to cause such signals to be given, and its habitual failure is an offense against the public. A thing which may be lawfully done may, because of the manner of doing it, become unlawful. As, for instance, a city may lawfully excavate in a street for

the purpose of constructing sewers and cisterns, or for the purpose of laying water or gas pipes, yet the city may, by the careless or unskillful manner of doing so, be guilty of a nuisance. So it is not unlawful for a railroad, turnpike road, or canal company, having authority to construct its work across a public highway, to make an excavation or embankment across such highway in order to construct its own way, but it must take proper precautions for the convenience and safety of the public while the work is in progress. So, too, it is not unlawful for the owner of an estate to blast rock near to a highway, but if many persons are accustomed to travel the highway at all times during the day, it would be the plain duty of the owner of the estate to give warning when a blast was about to be made, so that those near by might secure their own safety by getting or remaining beyond the reach of harm; and there can be no doubt but habitual blasting, under the circumstances supposed, without the reasonable and necessary precaution necessary to secure the safety of travelers, would render the owner of the estate amenable to a public prosecution for a nuisance. The appellant may lawfully run its trains at any reasonable rate of speed, but it is bound to take reasonable precautions to prevent the enjoyment of its privilege from injuring those crossing its road upon public highways. Their rights are equal to those of the appellant, and each must so enjoy his or its own as not unnecessarily to imperil the safety or impair the privileges of the other."

country to be passed over, and the obstacles to be encountered or avoided.¹ But where the company has been authorized so to locate the route as to take land already appropriated, under a previous and equal authority by another company, no unnecessary damage should be done to the first road or to the public.² Where the charter fixes one terminus of the road at or near a certain point, the company is permitted a large discretion in locating its route,³ the exercise of which will not be reviewed, unless the company has clearly abused the privilege or acted in bad faith.⁴ Where the charter of a railroad fixed a terminus "at or near P.," it was held that a location a mile and a half from P. was not transgressive of the discretion allowed.⁵ A right is given to extend a road to and unite with any other road within the prescribed limits by a general power conferred upon a railroad company by its charter "to extend to and unite its railroad with any other railroad now constructed, or which may hereafter be constructed, in this state"; and this power is not limited by other provisions declaring that certain proceedings for the condemnation of lands shall be taken in a particular county.⁶ A railroad is not exempted from liability for injuries caused to public or private rights in the manner in which it has constructed or maintained its road by a statute, which "ratifies and confirms" the "location" of the road and the "railroad" as "actually laid out and constructed."⁷ Power in the charter of a railroad company to enter a city confers, of necessity, the right to locate the road somewhere, and if need be, upon a street or alley.⁸

¹ *Southern etc. R. R. Co. v. Stoddard*, 6 Minn. 150; *Cleveland etc. R. R. Co. v. Speer*, 56 Pa. St. 325; 94 Am. Dec. 84.

² *New York etc. R. R. Co. v. R. R. Co.*, 36 Conn. 196.

³ *Fall River Co. v. R. R. Co.*, 5 Allen, 221.

⁴ *Fall River Co. v. R. R. Co.*, 5 Allen, 221; *Walker v. R. R. Co.*, 8 Ohio 38; *Southern etc. R. R. Co. v. Stod-*

dard, 6 Minn. 150; *Hentz v. R. R. Co.*, 13 Barb. 646; *Cleveland etc. R. R. v. Speer*, 56 Pa. St. 325; 94 Am. Dec. 84.

⁵ *Parke's Appeal*, 64 Pa. St. 137.

⁶ *Belleville R. R. Co. v. Gregory*, 15 Ill. 20; 58 Am. Dec. 589.

⁷ *City of Salem v. R. R. Co.*, 98 Mass. 431; 96 Am. Dec. 650.

⁸ *Tenn. etc. R. R. Co. v. Adams*, 3 Head, 596.

And a charter authority to build a railroad to a city named imports an authority to extend the road within the city limits.¹ The spot where switches should be placed lies in the absolute discretion of the company, and cannot be readjudged by a private citizen, where the right to side-tracks for standing room, or to pass from the main track to the shops or yards of the company, is clearly given.² A location of the route of a railroad sufficient to fix the liability of subscribers to the stock may be completed by resolutions, the publication of maps, or by other acts of the directors manifesting a corporate determination to construct the road over a particular route.³ But the articles of association of a railroad company are superior to a map of its road, and if the two are in conflict, the map must yield.⁴ A railroad company, aided in the construction of its road by taxation of a township at one terminus of its proposed route, may be compelled to construct, maintain, and operate its road to that point; and on a foreclosure sale of the road and the company's franchise, the purchaser incurs the same obligation.⁵ An agreement by a railroad company to locate a road through the city, and to cross a stream north of a certain street, requires the company to cross that stream where a northerly line from said street would intersect it. It is not necessary to cross in the city unless such line strikes the river within the city.⁶ The charter of corporation authorizing it to build a railroad from the borough of Erie then bounded south by Twelfth Street is not complied with where the borough is subsequently extended farther south by a building of the road from a point within the enlarged borough, but some distance outside of the former borough line, the change of the borough lines not affecting the obligations of the

¹ *Rio Grande etc. R. R. Co. v. Brownsville*, 45 Tex. 88; *Moses v. R. Co.*, 21 Ill. 516.

² *Cleveland etc. R. R. Co. v. Speer*, 56 Pa. St. 325; 94 Am. Dec. 84.

³ *Parker v. Thomas*, 28 Ind. 277.

⁴ *Mason v. R. R. Co.*, 35 Barb. 373.

⁵ *State v. R. R. Co.*, 71 Iowa, 410; 60 Am. Rep. 806.

⁶ *New Albany etc. R. R. Co. v. McCormick*, 10 Ind. 499; 71 Am. Dec. 337.

corporation.¹ A location of a railroad by a jury, instead of by the company, under an act authorizing the company to locate the road, such location to be approved by the court of quarter-sessions upon report of a jury after a view, is no ground of objection to the location; for the provision being for the benefit of the company, it may waive it, or the jury may be regarded as its agent.² A railroad company cannot construct its road along the shore of tide-water below high-water mark without a specific grant from the state.³ The leasing of a part of a railroad between two points is not a compliance with a contract to construct a road between said points.⁴ A contract by a railway company to locate depots at a particular point, and no other, in a town, is against public policy.⁵

ILLUSTRATIONS.—An act of the legislature authorized "all railroad companies, upon equal terms, to run their locomotives and cars over the track" of the Union Railway Company of Baltimore. *Held*, that this provision did not confer upon such railroad company the power to construct lateral railroads connecting with other railroads running to Baltimore: *Baltimore etc. Turnpike Co. v. R. R. Co.*, 35 Md. 224; 6 Am. Rep. 397. The charter of a railroad company authorized the taking land by the company for their road, not exceeding six rods in width, for a certain period. By a later act the time for completing the road was extended, and all rights, etc., of the company were continued. *Held*, that during the extended term they might take six rods in width, notwithstanding the general statute of the state regulating railroads allowed only four rods to be taken: *Eaton v. R. R. Co.*, 59 Me. 520; 8 Am. Rep. 430. The charter of a railroad company provided that any county through which "said road may run, and every county through which any other railroad may run with which this road may be joined, connected, or interested," may aid in the construction of such

¹ *Commonwealth v. R. R. Co.*, 27 Pa. St. 339; 67 Am. Dec. 471.

² *In re Phila. etc. R. R. Co.*, 6 Whart. 25; 36 Am. Dec. 202.

³ *Stevens v. R. R. Co.*, 34 N. J. 532; 3 Am. Rep. 269; *Stevens v. R. R. Co.*, 21 N. J. Eq. 259.

⁴ *Lawrence v. Smith*, 57 Iowa, 701.

⁵ *Marsh v. R. R. Co.*, 64 Ill. 414; 16 Am. Rep. 564; *St. Louis etc. R. R. Co. v. Mathers*, 71 Ill. 592; 22 Am. Rep. 122; *St. Joseph etc. R. R. Co. v. Ryan*, 11 Kan. 602; 15 Am. Rep. 357; *Pacific etc. R. R. Co. v. Seeley*, 45 Mo. 212; 100 Am. Dec. 369.

road. Another company was subsequently chartered to build a road, whose course ran up to one terminus of the road of the company previously chartered, and thence onwards completely through another county adjoining the county in which the former road lay, and the railroad company first chartered undertook the construction of the new road from the terminus above mentioned onwards, completely through the other and adjoining counties. *Held*, that the authority to construct the connecting road, and the entering into a contract for its construction, formed a "connection" within the meaning of the charter: *Kenicott v. Supervisors*, 16 Wall. 452.

§ 546. Power to Change Location or Route.— After the road has been located and constructed according to the route, or between the termini named in the charter, the company's power to select the route is exhausted, and it cannot change it.¹ The route can be changed only by authority of the legislature.² And a provision in a charter that if the company find it necessary to change the location of any portion of a public road they are authorized so to do, and to occupy such portions as they may deem expedient, does not make them the sole judges of the necessity, etc., but empowers them to change the location only when the necessity actually exists.³ But in Mississippi it has been held that a railroad may alter the location of their depots and tracks after the road has been completed under the first location, if the necessity for the change is manifest, and no detriment ensues therefrom to the public; and in so relocating the line of their track they may condemn private property for that purpose.⁴ Where a railroad was authorized by its charter to construct its road from a certain city to another place, it was held that it might construct its road from any point in the city; that, upon the facts shown, its power to

¹ *Brigham v. R. R. Co.*, 1 Allen, 316; *Morris etc. R. R. Co. v. R. R. Co.*, 31 N. J. L. 205; *Neal v. R. R. Co.*, 2 Grant Cas. 137; *Little Miami R. R. Co. v. Naylor*, 2 Ohio St. 235; 59 Am. Dec. 667.

² *Mason v. R. R. Co.*, 35 Barb. 375. ³ *Easton etc. R. R. Co. v. Greenwich*, 25 N. J. Eq. 565.

⁴ *Mississippi etc. R. R. Co. v. Devaney* 42 Miss. 555, 583; 2 Am. Rep. 608.

locate its terminus had not been exhausted, and that therefore another terminus might be selected; and that were this not so, under the provisions of the statute empowering railroad companies to construct branch roads, a road might be laid from the terminus first selected to the other.¹ Power to "maintain" a railroad does not imply a power to change the location after the railroad has been constructed.² Power to change the "location" or "route" does not include the power to change the terminus.³

§ 547. Construction of Road.—Words of mere permission in a charter, do not make it *per se* obligatory on a railroad to construct its road.⁴ A railroad company authorized to build a railroad has no power to contract with an individual to construct a railroad on their route solely for his own use.⁵ An agreement by a company not to build a portion of its line at the instance of a competing line is void.⁶ Where by the terms of the charter a railroad company was required to erect a sufficient causeway on each farm over which the road ran, it was held that the company could erect the causeway upon any part of the farm which they found most convenient.⁷ A railroad company is not liable for damages caused by a contractor's train passing over a portion of the road not accepted by the company.⁸ In New York, the remedy against a railroad company for disusing a part of its road after completion is by an action to vacate the charter or annul the existence of the corporation,⁹ and not an

¹ Western Pennsylvania R. R. Co.'s Appeal, 99 Pa. St. 155.

² Moorhead v. R. R. Co., 17 Ohio, 340.

³ Attorney-General v. R. R. Co., 36 Wis. 466.

⁴ York etc. R. R. Co. v. Regina, 1 El. & B. 858.

⁵ Stewart's Appeal, 56 Pa. St. 413.

⁶ State v. R. R. Co., 29 Conn. 538; Hartford R. R. Co. v. R. R. Co., 3 Rob. (N.Y.) 411.

⁷ Holmes v. R. R. Co., 1 Pa. L. J. 384.

⁸ Union Pacific R. R. Co. v. Hause, 1 Wy. 27.

⁹ People v. R. R. Co., 24 N. Y. 261; 82 Am. Dec. 295.

action in equity, on behalf of the people, to enforce a specific performance.¹

§ 548. **Powers as to Making Contracts.**—A railroad company has power to make any contract necessary for the purposes for which it was created, and not forbidden by its charter or by statute.² The purchase by one railroad of a controlling interest in another is *ultra vires*, and not within power granted to consolidate.³ But a railroad company having the right of constructing a particular line of railroad, with general power to purchase all kinds of property of whatever nature or kind, may purchase from another company a road constructed upon that line.⁴ Building a railroad track so as to contribute to other purposes is within the charter powers of a railroad company, if the primary object was for railroad purposes.⁵ A mortgage on future net earnings, for the purpose of securing prompt payment of interest on its construction bonds, is valid.⁶ A railroad company authorized "to do all acts needful to carry into effect the objects for which it was created," including the right to exact a compensation not exceeding a specified rate for transportation of persons and property, may contract for the transportation of freight for a fixed period.⁷ A railroad corporation has no power to guarantee the payment of expense of a public musical festival, although such festival was reasonably expected to be of pecuniary benefit to the guarantors, and expense was incurred in reliance upon the guaranty.⁸ It has no common-law authority to mortgage its franchise;⁹ but having

¹ *People v. R. R. Co.*, 24 N. Y. 261; 82 Am. Dec. 295.

² See Part I., Corporations. *Muir v. R. R. Co.*, 8 Dana, 161; *Old Colony R. R. Co. v. Evans*, 6 Gray, 25; *Bardstown etc. R. R. Co. v. Metcalfe*, 4 Met. (Ky.) 199; 81 Am. Dec. 541; *Olcott v. R. R. Co.*, 27 N. Y. 546; 84 Am. Dec. 298.

³ *Elkins v. R. R. Co.*, 36 N. J. Eq. 5.

⁴ *Branch v. Jessup*, 106 U. S. 468.

⁵ *Jones v. R. R. Co.*, 27 Vt. 399; 65 Am. Dec. 206.

⁶ *Jessup v. Bridge*, 11 Iowa, 572; 79 Am. Dec. 513.

⁷ *R. R. Co. v. Furnace Co.*, 37 Ohio St. 321; 41 Am. Rep. 509.

⁸ *Davis v. R. R. Co.*, 131 Mass. 258; 41 Am. Rep. 221.

⁹ *Commonwealth v. Smith*, 10 Allen, 448; 87 Am. Dec. 672; *Richardson v. Sibley*, 11 Allen, 65; 87 Am. Dec. 700.

a general power to mortgage its road, it may mortgage any part of it.¹ Nor to acquire land for purposes of speculation under a grant of power to acquire and hold sufficient real estate for the construction of its road and for the erection of depots, engine-houses, etc.² Nor, as a branch of its business, deal in notes and bills of exchange.³

§ 549. Power to Lease Road — Rights and Liabilities of Lessor and Lessee.— One railroad company cannot lease the entire use of its road to another company without the consent of the legislature;⁴ and a court of equity will not aid in enforcing a lease of a railroad made without such consent.⁵ Under a grant of authority from the legislature to do so, a railroad company may lease its corporate works and property, with its franchises, to another company, and such lease will be valid.⁶ And under an authority to a railroad company to take a lease of any railroad that might be connected with its own, it may take a lease of a competing road, if, when united, the two roads are capable of forming a continuous line.⁷ But under a statute authorizing any railroad company incorporated under the New York law, and with a terminus in New York harbor, to purchase or lease steamboats, and to operate a ferry over New York harbor to any point distant not more than ten miles from the terminus, a railroad corporation may not lease a ferry route having no connection with the terminus of road.⁸ And an unrestricted power granted to a company to farm out its road was construed to authorize a lease, with power to the

¹ Pullan v. R. R. Co., 4 Biss. 35.

² Pacific R. R. Co. v. Seely, 45 Mo. 212; 100 Am. Dec. 369.

³ Goodrich v. Reynolds etc., 31 Ill. 490; 83 Am. Dec. 240.

⁴ Troy etc. R. R. Co. v. Kerr, 17 Barb. 581; Black v. Canal Co., 22 N. J. Eq. 399; Johnson v. R. R. Co., 3 De Gex, M. & G. 914; Beman v. Rufford, 1 Sim., N. S., 550; Thomas v. R. R. Co., 101 U. S. 71; Pierce on Railroads, 283; Abbott v. R. R. Co., 80 N. Y. 27; 36

Am. Rep. 572; Stevens v. Davison, 18 Gratt. 319; 98 Am. Dec. 692.

⁵ Johnson v. R. R. Co., 3 De Gex, M. & G. 914.

⁶ Black v. R. R. Co., 24 N. J. Eq. 455; Kent Coast R. R. Co. v. R. R. Co., L. R. 3 Ch. 656; Central R. R. Co. v. Macon, 43 Ga. 605; Phila. etc. R. R. Co. v. R. R. Co., 53 Pa. St. 20; Peters v. R. R. Co., 114 Mass. 127.

⁷ Wallace v. R. R. Co., 12 Hun, 460.

⁸ Starin v. New York, 42 Hun, 549.

lessee to change the gauge of the road.¹ But a lease made by the company for the purpose of extending its road beyond the terminus fixed by its charter is *ultra vires*.² A railroad company leasing its road, even by consent of the legislature, does not thereby escape responsibility to the public;³ and this is clearly so in the absence of statutory authority to lease its road.⁴ But the company lessee, under a lease authorized by statute, may, in respect to its traffic on the road, be held to the rule of liability imposed by law on the company leasing;⁵ and that it cannot dispute on the ground that the lease is void.⁶ The lessor is not responsible for the torts of the lessee,⁷ but it is otherwise if it continues, notwithstanding the lease, to operate the road,⁸ or allows it to be operated in its corporate name.⁹ The company lessee is in general bound by all the prohibitions and limitations contained in the charter of the company leasing, as well as entitled to all its rights and franchises;¹⁰ but it does not take the property and franchise subject to an existing liability for an injury caused by negligence which occurred prior to the lease.¹¹

The duty to fence, it is generally held, and the liability for injuries to cattle, is upon the company operating the road, though it is not a lessee.¹² When two railroad companies operate trains on the same road, one being the owner and the other a lessee, each is liable only for stock injured or killed by its trains by reason of the road being

¹ *State v. R. R. Co.*, 72 N. C. 634.

² *Union Bridge Co. v. R. R. Co.*, 7 Lana. 240.

³ *Nelson v. R. R. Co.*, 26 Vt. 717; 62 Am. Dec. 614; *Whitney v. R. R. Co.*, 44 Me. 362; 69 Am. Dec. 103; *Ohio etc. R. Co. v. Dunbar*, 20 Ill. 623; 71 Am. Dec. 291, and see note, pages 293-298.

⁴ *Abbott v. R. R. Co.*, 80 N. Y. 27; 36 Am. Rep. 572; *Lakin v. R. R. Co.*, 13 Or. 436; 57 Am. Rep. 25; and see *Carriera, post*.

⁵ *McMillan v. R. R. Co.*, 16 Mich. 79; 93 Am. Dec. 208.

⁶ *McCluer v. R. R. Co.*, 13 Gray, 124; 74 Am. Dec. 624.

⁷ *Mahoney v. R. R. Co.*, 63 Me. 68; *Ditchett v. R. R. Co.*, 67 N. Y. 425; *Linfield v. R. R. Co.*, 10 Cush. 562; 57 Am. Dec. 124.

⁸ *Ballou v. Farnum*, 9 Allen, 47.

⁹ *Bower v. R. R. Co.*, 42 Iowa, 546; *Singleton v. R. R. Co.*, 70 Ga. 464; 48 Am. Rep. 574.

¹⁰ *Penn. R. R. Co. v. Sly*, 65 Pa. St. 205.

¹¹ *Pittsburg R. R. Co. v. Kain*, 35 Ind. 291.

¹² *Pierce on Railroads*, 411.

unfenced, and not for that injured or killed by the trains of the other.¹ Nor is this rule changed by the fact that the lessor had the right to fix the time-table subordinate to which the lessee trains were operated, and was also bound to keep up the fence.² Where a lessee operated a road in its own name, and not in the name of the lessor, it was held that the lessor was not liable for an injury to stock caused by a negligence of the employees of the lessee.³ Where a railroad, with the approval of the legislature, exclusively leased its road to another company for ninety-nine years, and, by the lessee's neglect, combustibles on the railroad land communicated fire to adjoining buildings, it was held that the lessor was liable.⁴

The statutes of many of the states generally provide that railroads may lease other lines, where the latter are not continuous, connecting, or competing lines, upon a vote of a certain proportion of the stock, at a properly called meeting. Thus the statute of Alabama provides: "Any railroad company heretofore or hereafter incorporated may, at any time, by means of subscription to the capital of any other company, or otherwise, and such company, in the construction of its railroad, for the purpose of forming a connection with the road owned by the company furnishing aid, or any railroad company organized in pursuance of law, may lease or purchase any part or all of any railroad constructed by any other company, if the lines of said road are continuous or connected, upon such terms and conditions as may be agreed on between the companies respectively; or any two or more railroad companies whose lines are so connected may enter into any arrangement for their common benefit, consistent with and calculated to promote the objects for which they were created; but no such aid shall be furnished, nor any

¹ *Stephens v. R. R. Co.*, 36 Iowa, 327.

² *Clary v. R. R. Co.*, 37 Iowa, 344.

³ *Pittsburg etc. R. R. Co. v. Hannon*, 60 Ind. 417.

⁴ *Balsley v. R. R. Co.*, 119 Ill. 68; 59 Am. Rep. 784.

purchase, lease, or arrangement perfected, until a meeting of the stockholders of each of said companies has been called by the directors thereof, at such time and place and in such manner as they shall designate, and the holders of least two thirds of the stock of such company " shall have assented thereto.¹ Similar statutes are in force in other states, with additional provisions.

In Arkansas, a similar statute provides that an Arkansas corporation leasing to a foreign one shall remain liable, and so shall the former, but a satisfaction against one shall discharge the other.²

In California, railroads are given a general power to lease.³

In Colorado, the statute extends to corporations organized under the laws of " an adjoining state or territory," which may lease any part or all of a " railroad constructed by another company in or without this state." The words " not competing or parallel " are used in this statute. Thirty days' notice is required of a meeting of the stockholders, and a two-thirds vote necessary.⁴

In Connecticut: " No lease of any railroad hereafter made shall be binding on either of the contracting parties for a period of more than twelve months, unless the same shall be approved by the stockholders of the company or companies that are parties to the lease, by a vote of two thirds of the stock represented, in person or by proxy, at a meeting of the stockholders called for that purpose, and at least one month's notice shall be given of such meeting, by advertising twice a week for four weeks in a daily paper published in the state, and also by mailing a copy of the call and of the lease to each stockholder, and said notice and call shall state that at the meeting the lease will be submitted for the approval of the stockholders."⁵

¹ Code 1876, sec. 2011.

² Acts 1881, p. 79.

³ Code Amendment, April 3, 1890.

⁴ Session Laws 1881, p. 68.

⁵ Laws 1878, p. 302.

In Dakota Territory: "Railroads organized in pursuance of law, either within this or any other territory or state, may lease or purchase any part or all of any railroad," etc. A two-thirds vote is required.¹

In Illinois: "All railroad companies incorporated or organized under, or which may be incorporated or organized under, the authority of the law of this state, shall have power to make such contracts and arrangements with each other, and with railroad corporations of other states, for leasing or running their roads, or any part thereof."²

In Indiana: "All railroad companies now organized, or that may be hereafter organized, under the law of this state, having connecting roads, may enter into contracts by their respective boards of directors, by which the locomotives and trains of one railroad company for the transportation of freight and passengers may be run and be operated over and upon the track and road of another railroad company, upon such terms as the said companies may agree upon. Such railroad is liable to third persons for damages as though the company owned the track;³ and lessees, assignees, receivers, etc., running a railroad are liable jointly with the corporation for stock killed."⁴

In Iowa, the lessee is liable in the same manner as though the road belonged to it.⁵

The Kansas statute is similar to the Alabama statute,⁶ and lessees are liable for injuries to stock, whether caused by negligence or not.⁷ A company operating a railroad for the benefit of bond-holders and stockholders of the railroad is not an assignee or lessee, but is a railroad company, within the terms of the statute, and is, therefore, liable.⁸

In Maine, a charter, or any rights under it, cannot be

¹ Civil Code 1877, p. 306.

² Stats. (Hurd) 1877, c. 114, p. 766, sec. 34; p. 1146.

³ Acts 1873, p. 186.

⁴ Acts 1876, p. 751.

⁵ Code 1873, p. 233.

⁶ Comp. Laws 1881, p. 784.

⁷ Comp. Laws 1881, p. 784.

⁸ Union Trust Co. v. Kendall, 20 Kan. 515.

assigned without legislative assent of the legislature. On a violation of this, *quo warranto* will lie at the instance of any person.¹

In Maryland, no railroad company shall make a contract of consolidation with another, or "to aid any other railroad company in the construction of its railroad, by means of subscription to the capital stock of such other railroad company, or otherwise, or shall lease or purchase all or any part of any railroad constructed by any other railroad company, without the authority of an act of assembly, authorizing it to enter into such agreement, or give such aid, or to make such lease or purchase, being first had and obtained."²

In Massachusetts: "Any railroad corporation created by this state may lease its road to any other railroad corporation so created with whose road it connects, or which it intersects, upon such terms as the directors may agree, and as may be approved by a majority in interest of the stockholders of each corporation, at meetings duly called for the purpose; and copies of such contracts or leases shall be deposited with the board of railroad commissioners," etc.³ And further: "The roads of two railroads shall be deemed to enter upon each other, connect, or intersect, within the meaning of section 170 of chapter 372 of the act of the year 1874, if one of such roads enters upon, connects with, or intersects a road leased to the other road, or operated by it under a contract as authorized by said section."⁴

The Michigan statute is similar to the Indiana statute. A company operating the road of another company under a general contract is the agent of the latter company within the terms of the statute, and is liable as such.⁵

¹ Rev. Stats. 1881, p. 453.

⁴ Mass. Acts and Resolves 1880, c.

² Rev. Code 1878, art. 41, sec. 21, 208.

³ Bay City R. R. Co. v. Austin, 21

⁵ Mass. Supplement to Gen. Stats., Mich. 390; Laws 1873, p. 520, sec. 28.

vol. 1, 1860-72, c. 180, p. 967; Acts and Resolves 1874, c. 372, sec. 170.

In Minnesota, the statute is similar to the Alabama statute;¹ a two-thirds vote required. A subsequent act extends the provisions of the statute to foreign corporations, and prohibits leasing of parallel or competing lines.²

In Missouri, companies may lease railroads "in adjoining states, or in this state, if the lines are continuous or connected." Sixty days' public notice is required of a meeting called by the directors and the holders of a majority of the stock of the company in person, or by proxy, assenting thereto, or the holders of the majority of stock of such company assenting thereto in writing. It is further provided that corporations of that state leasing their road to corporations of another state shall remain liable as if they operated the road themselves, and a corporation of other states being lessees of railroads of that state shall likewise be liable for the violation of any of the laws of the state, may sue and be sued, etc., but a satisfaction of any claim or judgment by either of the companies shall discharge the other.³ A subsequent act extends the right to lease to railroads of "any state," in addition to that of "adjoining states."⁴ The constitution of that state prohibits the leasing of parallel or competing lines;⁵ such question to be determined, when demanded, by a jury.

In Nebraska, the provisions of the Alabama statute are substantially followed;⁶ a two-thirds vote necessary.

In New Hampshire, rival and competing roads cannot be leased, and "no sale, lease, mortgage, or contract for the use of any railroad shall be valid unless it shall be in writing, filed in the office of the secretary of state, and authorized by the legislature."⁷

In New Jersey, the general laws authorize companies to lease other roads of that "or any other state."⁸

¹ Stats. 1878, sec. 69, p. 382.

² Laws 1881, c. 94, p. 109.

³ Rev. Stats. 1879, vol. 1, p. 135.

⁴ Laws 1881, p. 75.

⁵ Const. 1875, art. 12, sec. 17.

⁶ Laws 1873, sec. 94, p. 190.

⁷ Gen. Laws 1878, c. 158-159.

⁸ Revision 1709-1877, p. 930.

In New Mexico, leases may be made between companies organized in pursuance of law, either within or without the state or territory.¹

In New York, the assent of a majority in amount of the stockholders of the company owning such leased road is necessary, at a meeting called for the purpose. By subsequent act, it is immaterial, in the case of a railroad not exceeding ten miles in length, whether the assent of said stockholders has been obtained at a stockholders' meeting, or has been individually given in writing.²

In Ohio, the same provisions exist, substantially, as in the Alabama statute. The roads must be "continuous and connected, and not competing."³ Thirty days' notice is required, and the assent of the holders of at least two thirds of the stock of each company, in person or by proxy, necessary.

In Pennsylvania, a general power to lease is given, whether the road is within or without or created by the state or not, and any railroad may guarantee the covenants of a lease, etc., provided the roads are so connected as to form a continuous route.⁴

In Tennessee, railroads may lease connecting lines upon such terms and conditions as may be agreed upon between the president and directors of the contracting parties.⁵ Consent of the stockholders present or represented at a regular annual meeting necessary, which consent shall be manifested by a vote of three fourths of the stock present or represented at such annual meeting in favor of such leasing.⁶ The roads must be connected with each other by a subsequent statute, directly, or by means of intervening lines.⁷

¹ Laws 1880, p. 471.

² Stats. 1880, c. 349, sec. 1.

³ Rev. Stats. 1880, secs. 3300, 3301.

⁴ Laws 1870, p. 31; see Const., art. 17, sec. 17, which prohibits the

controlling of parallel or competing lines.

⁵ Code 1858, sec. 1424; Stats. of Tenn., 1871, sec. 1424.

⁶ Acts 1867-68, c. 72, sec. 1.

⁷ Acts 1869-70, c. 50.

In Texas, an express prohibition exists against leasing "parallel" or competing lines.¹

In Vermont: "Railroad companies in this state may make contracts and arrangements with each other, and with railroad corporations incorporated under the laws of the United States, or under the authority of the government of Canada, for leasing and running the roads of the respective corporations, or a part thereof, by either of their respective companies."²

In West Virginia, a railroad corporation "may lease its railroad for a term of years to any corporation owning or operating any connecting line of railroad wholly or partly within this state, in order to make a continuous line of railroad to be run and operated with or without change of cars, or break of bulk, or transfer of passengers or freight."³ The constitution of said state prohibits obtaining possession or control of a parallel or competing line, by lease or other contract, without the permission of the legislature.⁴

In Wisconsin: "Any railroad corporation whose line is wholly within this state may lease or purchase the railroad franchises, immunities, and all other property and appurtenances thereof, of any other railroad corporation, when their respective railroads can be lawfully connected and operated together to constitute one continuous main line with or without branches." But no railroad company shall lease any other railroad corporation which owns or controls a parallel or competing line, to be determined by a jury.⁵

§ 550. Liability for Acts of Agents or Servants. — A railroad company is liable for the acts of its officers and agents within the range of their authority.⁶ A depot-agent,

¹ Rev. Stats. 1879, p. 610, arts. 4246, 4247.

² Rev. Laws 1880, c. 154.

³ Acts 1877, c. 106.

⁴ Const., art. 11, sec. 11.

⁵ Laws 1880, c. 260.

⁶ See Titles, Corporations, Bailments, Carriers, *post*; Master and Servant, *ante*.

who receives and forwards freight, in the absence of special instructions made known to the public, can bind the company to receive and forward merchandise, and the contract may be made before the goods are actually tendered or delivered.¹ Although a station-agent of a railroad company has not been authorized to employ a surgeon to attend an employee injured in the service of the company, yet slight acts of ratification by the company will authorize a jury in finding that the employment was a corporate act.² A railroad, by whose direction a contractor enters and builds the road upon lands which it has acquired subject to an existing lease, is liable as a joint tort-feasor with him and his servants for their damages therein to the crops of the lessee.³

§ 551. Acquisition of Lands—By Contract.—A railroad company has power to acquire land for the purposes of the road by a contract with the owner of it.⁴ It may compel specific performance of a contract to convey land to it for a right of way.⁵ A verbal contract by the owner of the lands is sufficient,⁶ and will bar a recovery for the use of the land until the consent is revoked.⁷ Where a land-owner agrees with a railroad company upon the compensation to be made for lands over which the road is laid, and permits the company to take possession of the land and construct their road thereon, it is too late for him to take advantage of the omission of the company to record the survey, as required by its charter.⁸ A contract to convey land to a railroad on condition that it will locate its road in a certain way or build its depot at a certain place is not invalid.⁹

¹ *Watson v. R. R. Co.*, 9 Heisk. 255.

² *Cairo etc. R. R. Co. v. Mahoney*, 82 Ill. 73; 25 Am. Rep. 299.

³ *Ullman v. R. R. Co.*, 67 Mo. 118.

⁴ *Whitcomb v. R. R. Co.*, 25 Vt. 49; *McClure v. R. R. Co.*, 9 Kan. 373; and see *Eminent Domain*, *post*, Division V.

⁵ *Chicago etc. R. R. Co. v. Swin-*

ney, 38 Iowa, 182. See *Title Contracts—Specific Performance*.

⁶ *Central R. R. Co. v. Hetfield*, 29 N. J. L. 206, 571.

⁷ *Blaisdell v. R. R. Co.*, 51 N. H. 483; *Miller v. R. R. Co.*, 6 Hill, 61.

⁸ *Troy etc. R. R. Co. v. Potter*, 42 Vt. 265; 1 Am. Rep. 325.

⁹ *McClure v. R. R. Co.*, 9 Kan. 373. See *post*, *Title Contracts*.

If the owner agrees to relinquish to a railroad company the right of way through his land, with a provision in the contract that the depot shall be located at a certain designated point on the land, he cannot, after relinquishment and entry by the company, maintain trespass or ejectment against it for failing so to locate the depot.¹ The remedy of the land-owner in such case is an action for damages for breach of contract, or a suit in equity for specific performance.² Where the charter of a railroad authorizes it to acquire, by purchase, real estate necessary for the construction of its road, lands deeded to it will be presumed to be acquired for that purpose.³ Where the owner of real estate has granted the right of way over his property on condition that the company shall erect and maintain certain crossings, and the company has accepted the grant, it cannot avoid liability to perform such conditions by a subsequent condemnation of the right of way under the statute.⁴

§ 552. By Public Grant.—Public grants of lands to railroads are strictly construed.⁵ But a grant by the legislature of a right to construct a railroad, with such “appendages” as may be deemed necessary and convenient for its successful operation, vests the company with power to acquire land, through the process of condemnation, for turnouts, depots, engine-houses, shops, and turn-tables; these things being necessary conveniences in conducting the business of a railroad corporation.⁶ As between two railroad companies, both of which have the right to extend their tracks in and through a certain street to the terminus thereof, the company which first actually takes qualified possession of the middle of the street by locating and constructing an extension of its tracks thereon for a

¹ Hubbard v. R. R. Co., 63 Mo. 68.

² Hubbard v. R. R. Co., 63 Mo. 68.

³ Yates v. Van De Bogert, 56 N. Y. 528.

⁴ Gray v. R. R. Co., 37 Iowa, 119.

⁵ Packer v. R. R. Co., 19 Pa. St. 211.

⁶ Hannibal etc. R. R. Co. v. Muder, 49 Mo. 165.

part of the distance, until interfered with by the agent's or servants of the other company, acquires the right to complete the construction of its tracks to the terminus of the street, to the exclusion of the right of the other company to interfere in any way with the construction and operation of such extension so located.¹ Land granted by Congress to a state, although for the purpose of aiding the construction of a particular road, becomes subject to the control and disposition of the state legislature.² But lands granted by the United States to the Union Pacific Railroad Company are not liable to be taxed by the state.³ When a railroad, by not building its road, forfeits its land grant, it cannot be compelled by *mandamus* to build.⁴

§ 553. By Dedication. — Mere occupancy of land by a railroad company, for its corporate purposes, cannot establish a dedication of such land by the owner to such purposes;⁵ knowledge and acquiescence on his part for the full period fixed by statute for the limitation of real actions must be shown.⁶ Where a statute provides that railroad companies may acquire sites for depots, etc., by donation, by purchase, or by appropriation, but contains no provision for acquisitions by dedication, a railroad company cannot acquire land for a depot-site by dedication.⁷

§ 554. By Right of Eminent Domain. — The legislature has power to authorize railroad companies to appropriate lands by the exercise of the right of eminent domain.⁸

¹ *Waterbury v. R. R. Co.*, 54 Barb. 388.

² *Little Rock R. R. Co. v. Howell*, 31 Ark. 119.

³ *Union Pacific R. R. Co. v. McShane*, 18 Int. Rev. Rec. 68.

⁴ *State v. R. R. Co.*, 24 Fed. Rep. 179.

⁵ *Daniels v. R. R. Co.*, 35 Iowa, 129; 14 Am. Rep. 490.

⁶ *Daniels v. R. R. Co.*, 35 Iowa, 129; 14 Am. Rep. 490.

⁷ *Todd v. R. R. Co.*, 19 Ohio St. 514.

⁸ *Bloodgood v. R. R. Co.*, 18 Wend. 9; 31 Am. Dec. 313. As to eminent domain, see *post*, Title V., Constitutional Law.

§ 555. Status of Rails, Ties, etc., where Company a Trespasser. — Where the railroad constructs its road over land by the license of the owner, the rails, ties, etc., are regarded as trade fixtures.¹ If a railroad company, without acquiring title, and without the consent of the owner, take possession of land and lay its track thereon, the fixtures thus placed on the land become the property of the owner of the soil;² and he is entitled, on subsequent proceedings by the company to acquire title, to the increased value of the land by reason of the laying of the track.³ In an action of trespass against a railroad company for illegally laying its tracks on plaintiff's land, it is erroneous to render judgment that plaintiff be put in possession of the land in default of the company's paying damages.⁴

§ 556. Title or Interest of Railroad in Land. — The title to land either purchased by a railroad or acquired under the right of eminent domain is, as a rule, an interest in the land not amounting to a fee.⁵ In some of the states the absolute fee may be acquired by purchase, which the railroad may sell and convey when no longer needed for railroad purposes.⁶ But it is the general rule in the United States that the title acquired by railroad companies under statutory proceedings to condemn lands is not the absolute fee-simple, but merely the exclusive right to occupy and use the lands for their purpose.⁷ The fee remains in the owners, subject to that use, and on the

¹ North Cent. R. R. Co. v. Canton Co., 30 Md. 347.

² Van Size v. R. R. Co., 3 Hun, 613.

³ Van Size v. R. R. Co., 3 Hun, 613; Graham v. R. R. Co., 36 Ind. 463; 10 Am. Rep. 56.

⁴ Galveston etc. R. R. Co. v. Pfeuffer, 56 Tex. 66.

⁵ East Penn. R. R. Co. v. Schallenberger, 54 Pa. St. 144.

⁶ Nicoll v. R. R. Co., 12 N. Y. 121; Yates v. Van De Bogert, 56 N. Y. 526;

Kennedy v. Wallace, 24 Hun, 478; Troy v. R. R. Co., 42 Vt. 265; Robbins v. R. R. Co., 22 Minn. 286.

⁷ West Pa. R. R. Co. v. Johnson, 59 Pa. St. 290; Kellogg v. Malin, 50 Mo. 496; 11 Am. Rep. 426; Kan. Cent. R. R. Co. v. Allen, 22 Kan. 285; 31 Am. Rep. 190; Alabama etc. R. R. Co. v. Burkett, 42 Ala. 83; R. R. Co. v. Davis, 2 Dev. & B. 451; Heard v. Brooklyn, 60 N. Y. 242; Chicago etc. R. R. Co. v. Patchin, 16 Ill. 198; 61 Am. Dec. 65.

discontinuance of the use, such owners are entitled to resume possession.¹ Where a railroad corporation takes possession of premises under the right of eminent domain for railroad purposes, the occupation of buildings upon the premises, for the general purposes of trade and mechanical or manufacturing purposes, by lessees of the corporation, is a diversion of the premises from the corporate purposes, and a writ of entry will lie against the corporation by the original owners, in which they are entitled to judgment establishing their title as owners in fee, subject to the valid easement of the corporation, and for damages or mesne profits for the wrongful use of the premises.² Land taken by the state for a railroad, either by a fee-simple purchase or by right of eminent domain, does not revert to the original owner upon an abandonment of the use for which it was taken.³ Ejectment will lie for a right of way.⁴ The right of way of a railroad is

¹ *Alabama etc. R. R. Co. v. Burkett*, 42 Ala. 83; *Jackson v. R. R. Co.*, 25 Vt. 151; 60 Am. Dec. 246; *Strong v. Brooklyn*, 68 N. Y. 1; *Hastings v. R. R. Co.*, 38 Iowa, 316.

² *Proprietors v. R. R. Co.*, 104 Mass. 1; 6 Am. Rep. 181.

³ *Haldeman v. R. R. Co.*, 50 Pa. St. 425.

⁴ In *Tennessee etc. R. R. Co. v. R. R. Co.*, 75 Ala. 516, 51 Am. Rep. 475, the court say: "It is true that ejectment will not lie, as a general rule, for an easement, or to be let into the use or occupation of a servitude. The reason is, that the party complaining has only a right in common with the public or with some other person or persons to the use or occupation claimed. The right is a qualified limited one, and in ordinary cases is not disturbed by another's similar occupation. It is but a privilege to go on the lands of another for a specified limited purpose, and has no element of exclusiveness in it. A right of way or of common may be given as illustrations of this principle: 3 *Washington on Easements*, 3d ed., 260, 270; *Child v. Chappell*, 9 N. Y. 246; *Morgan v. Boyes*, 65 Me. 124; *Rees v. Lawless*,

12 Am. Dec. 295. There are cases which go beyond this doctrine: *Wood v. Turnpike Co.*, 24 Cal. 474; *Union Canal Co. v. Young*, 30 Am. Dec. 212; 2 *Wait's Actions and Defenses*, 747; 2 *Redfield on Railroads*, 553. Lands claimed and condemned as road-bed and right of way of a railroad stand in a different category from that of ordinary easements. Over them is acquired not the right of use to be enjoyed in common with the public or with other persons. The right and use are exclusive, and no one else has any right of way thereon: *M. & O. R. R. Co. v. Williams*, 53 Ala. 595; *M. & M. R. R. Co. v. Blakely*, 59 Ala. 471; *Tanner v. R. R. Co.*, 60 Ala. 621; *S. & N. R. R. Co. v. Pilgreen*, 62 Ala. 305; *Cook v. R. R. & Banking Co.*, 67 Ala. 533; *R. & G. R. R. Co. v. Davis*, 2 Dev. & B. 451; *Jackson v. R. & B. R. R. Co.*, 25 Vt. 150; 60 Am. Dec. 246; *T. & B. R. R. Co. v. Potter*, 42 Vt. 265; 1 Am. Rep. 325. Ejectment was originally classed as a possessory action. Hence it was that at common law any number of actions could be maintained by laying the demise at a later date; one recovery was only conclusive as to one and the same demise. A right

an encumbrance within the meaning of a covenant against encumbrances in a deed.¹

ILLUSTRATIONS. — A railroad company, in the construction of a bridge upon its road, built stone piers and abutments on lands over which it had acquired the right of way. It subsequently abandoned the construction of the railroad at that place. *Held*, that the piers and abutments did not pass to the land-owner. *Held, also*, that the fact that upon such abandonment the owner of the land had been allowed to take possession of that portion embraced in the right of way, and hold it for a period less than was required to extinguish the easement, did not of itself imply a relinquishment by the railroad company of its right to enter and remove the piers, etc.: *Wagner v. R. R. Co.*, 22 Ohio St. 563; 10 Am. Rep. 770.

§ 557. What does and What does not Pass to Railroad. — Where a railroad company acquires the fee of lands for its road, it has an exclusive right to unobstructed possession above its road,² and of all parts of the cutting, embankments, etc.³ Trees standing on the land taken, and which may be useful in the construction of its road, become the property of the company.⁴ A railroad company, or any contractor employed by them to build a railroad, may use any material removed by them in grading the road, either in the adjacent or, it seems, in other localities,⁵ but they have no right to sell such material to third parties.⁶ The company may use stone and gravel from one portion of their line in the proper construction of any

to the immediate possession in form legal, as distinguished from equitable, would always maintain the action, and it will yet. Prior possession is sufficient against any one afterward found in possession, unless the latter can show a paramount title, or a possession continuous, peaceable, and adverse, of sufficient duration to toll entry: *Tyler on Ejectment*, 70, 165; *Anderson v. Melear*, 56 Ala. 621. A lessee or termor during the continuance of a valid lease may maintain the action against the lessor, although the owner of the entire fee less the term. So the title of a railroad corporation to the possession of the soil

covered by the road-bed and right of way will, after condemnation, dominate all adverse claim of possession, even by the owner of the fee."

¹ *Beach v. Miller*, 51 Ill. 206; 2 Am. Rep. 290.

² *Junction R. R. Co. v. Boyd*, 8 Phila. 224.

³ *Phila. etc. R. R. Co. v. Hummell*, 44 Pa. St. 375; 84 Am. Dec. 457.

⁴ *Taylor v. R. R. Co.*, 38 N. J. L. 28.

⁵ *Evans v. Haefner*, 29 Mo. 141; *Chapin v. R. R. Co.*, 39 N. H. 564; 75 Am. Dec. 237.

⁶ *Aldrich v. Drury*, 8 R. I. 554; 5 Am. Rep. 624.

other portion thereof, even though they do not own the land, but only have a permissive license to use it for railroad purposes;¹ but under a deed of a right of way "for all purposes connected with the construction, use, and occupation of the railway," the company has no right to take sand from the land conveyed to build a round-house.² And the right of a railroad in its road-bed, under an arrangement whereby it has the right to construct and use a track and hold the same for railroad purposes, amounts only to a permissive license, and gives no right to the soil. Any stone, therefore, excavated in grading the track, and not actually used in the construction of the track, belongs to the owner of the land, and cannot be removed without his permission.³ The company does not, in procuring its right of way, acquire the right to enter upon and dig ditches through lands adjacent thereto,⁴ nor the right to divert a stream of water from its natural channel, to the injury of the land-owner.⁵ The right to the minerals below the surface of the land taken remains in the land-owner, subject only to the right of the company to construct and operate its road as authorized by law.⁶ The grant of a "right of way over and through the land, for all purposes connected with the construction, use, and occupation of its railroad," confers the right to dig wells thereon, although injury to a spring on the grantor's land resulted.⁷ A railroad who are riparian proprietors are entitled to abstract from the stream a supply of water for their locomotive-engines, provided that the supply taken is reasonable and does not interfere with the rights of lower proprietors.⁸ Authority to a railroad

¹ Chapin v. R. R. Co., 39 N. H. 564; 75 Am. Dec. 237.

² Vermilya v. R. R. Co., 66 Iowa, 606; 55 Am. Rep. 279.

³ Chapin v. R. R. Co., 39 N. H. 564; 75 Am. Dec. 237.

⁴ State v. Armell, 8 Kan. 288.

⁵ Stodghill v. R. R. Co., 43 Iowa, 26; 22 Am. Rep. 210.

⁶ Lyon v. Gormley, 53 Pa. St. 261; Blake v. Rich, 34 N. H. 282; Connecticut etc. R. R. Co. v. Holton, 32 Vt. 43.

⁷ Houghan v. R. R. Co., 35 Iowa, 558; 14 Am. Rep. 502.

⁸ Earl of Sandwich v. R. R. Co., L. R. 10 Ch. Div. 707.

company to locate its road upon certain land does not authorize it to convert the land to a different purpose.¹

§ 558. Rights of Railroad — To Sole Use of its Land. — A railroad company has the right at all times to the exclusive occupancy of the land taken for its road,² and the right to exclude all concurrent occupancy by the former owners and all other persons, in any mode and for any purpose.³ Thus where a railroad company within the limits of a city made a deep cut and arched over the track, placing a few feet of earth over the crown of the arch, it was held that an injunction would be granted restraining the defendants from building a chapel on the archway, although authorized to do so by the city councils.⁴ The company may maintain trespass for all entries and acts of the adjoining land-owner upon the land taken for its road which may in the least degree embarrass the use of the road for the purposes for which it was built.⁵

§ 559. May Exclude Persons from its Grounds. — It may exclude persons from its grounds who have no legitimate business there growing out of the operation of the road or with the officers or employees of the company.⁶ It seems that it has no power or right to grant an easement of a footway for persons to walk on or by the side of their tracks. There can be no prescriptive right or presumption of such a grant, though parties owning houses along the line of the railroad for twenty-five years have used a private footway over the lands of the company from the houses to a public highway.⁷

¹ *Giesy v. R. R. Co.*, 4 Ohio St. 308; *Road Co. v. Renfroes*, 58 Mo. 265.

² *Commonwealth v. Power*, 7 Met. 596; 41 Am. Dec. 465; *Jackson v. R. R. Co.*, 25 Vt. 150; 60 Am. Dec. 246; *R. R. Co. v. Skinner*, 19 Pa. St. 298; 57 Am. Dec. 655.

³ *Hurd v. R. R. Co.*, 25 Vt. 121; *Troy etc. R. R. Co. v. Potter*, 42 Vt. 265; 1 Am. Rep. 325.

⁴ *Junction R. R. Co. v. Boyd*, 1 Leg. Gaz. 107.

⁵ *Connecticut etc. R. R. Co. v. Holton*, 32 Vt. 43.

⁶ *Hall v. Power*, 12 Met. 492; 46 Am. Dec. 698; *Commonwealth v. Power*, 7 Met. 596; 41 Am. Dec. 465. See *post*, Negligence; Bailments.

⁷ *Sapp v. R. R. Co.*, 51 Md. 115.

§ 560. **The Right of Way.**—The owner of the land adjoining a railroad, and from whom the land was taken for the construction and use of the road under the power conferred by the charter, has no right to enter upon the land after it is so taken, and while it is being so used, and cut and take therefrom the herbage and other products of the soil growing thereon.¹ The company cannot occupy lands within the limits of the right of way for purposes not necessarily connected with the use of its franchise.² But the erection of buildings by the permission of the company within such limits by other parties, for convenience in delivering and receiving freight, was held not to be inconsistent with the purposes for which the charter was granted.³ It has a right to cut the trees growing on the strip of land taken for its road, whether such trees are for shade, ornament, or fruit.⁴ It may remove or destroy grass on the right of way in which it has an easement, without being liable in trespass to the owner of the fee.⁵ Damages are not recoverable against a town which has laid out ways over plaintiff's track for the inconvenience occasioned to its business by the opening of the new ways, nor for any increased risks or expense in running its trains caused thereby.⁶

§ 561. **Its Track.**—A railroad track is private property, and the public have no right to pass upon it, except at highway crossings.⁷ But when it has long, con-

¹ *Troy etc. R. R. Co. v. Potter*, 42 Vt. 265; 1 Am. Rep. 325.

² *Lance's Appeal*, 55 Pa. St. 16; 93 Am. Dec. 722.

³ *Grand Trunk R. R. Co. v. Richardson*, 91 U. S. 454.

⁴ *Brainard v. Clapp*, 10 Cush. 6; 57 Am. Dec. 74.

⁵ *Hayden v. Skillings*, 78 Me. 413.

⁶ *Portland etc. R. R. Co. v. Deering*, 78 Me. 61.

⁷ *Isabel v. R. R. Co.*, 60 Mo. 475; *Williams v. R. R. Co.*, 2 Mich. 259;

55 Am. Dec. 59; *Jackson v. R. R. Co.*, 25 Vt. 150; 60 Am. Dec. 247; *Murch v. R. R. Co.*, 29 N. H. 9; 61 Am. Dec. 631; *Mulherrin v. R. R. Co.*, 81 Pa. St. 375; *Cauley v. R. R. Co.*, 95 Pa. St. 401; 40 Am. Rep. 664; *Philadelphia etc. R. R. Co. v. Spearen*, 47 Pa. St. 303; 86 Am. Dec. 644; *Philadelphia etc. R. R. Co. v. Hummel*, 44 Pa. St. 378; 84 Am. Dec. 457; *Little Schuylkill R. R. Co. v. Norton*, 24 Pa. St. 465; 64 Am. Dec. 672. See *post*, Negligence.

stantly, and notoriously permitted the public to cross its track at a place not in a highway, it is bound to use reasonable care toward persons so crossing, and to give notice and warning to them; and what constitutes reasonable care is a question of fact.¹ A permission by the company to its employees to live within the inclosure of its road is not to be construed as a license to any others to walk upon the track in coming to the homes of such servants.² If a railroad runs through and divides a farm into two parts, so that the owner cannot pass from one part to the other without crossing the track, he has a right to cross, and is not necessarily a trespasser when his cattle are on the track.³

§ 562. As to Depots and Stations. — It is the duty of a railroad company, and it will be compelled by the court, to furnish and maintain stations for passengers and freight at all proper points on the line;⁴ but it may locate its stations on such route and at such points as in its judgment will be beneficial to its own and the public interest, in the absence in its charter of any prescribed limit of approach towards buildings and bridges;⁵ it may bind itself to maintain perpetually a permanent depot at a particular place.⁶ An action lies for a breach of a contract by a railroad company to establish and maintain a depot at a certain place.⁷ It has the right to keep at its stations such supplies of wood as are in its judgment necessary for its present or future use, and it is not liable for any injury caused by the accidental burning thereof, unless it results from the gross negligence or carelessness of the company

¹ *Byrne v. R. R. Co.*, 104 N. Y. 362; 58 Am. Rep. 512. See *post*, Negligence.

² *Galena etc. R. R. Co. v. Jacobs*, 20 Ill. 478.

³ *Housatonic R. R. Co. v. Waterbury*, 23 Conn. 101.

⁴ *State v. R. R. Co.*, 17 Neb. 647; 52 Am. Rep. 424; *contra*, *People v.*

R. R. Co., 104 N. Y. 58; 58 Am. Rep. 484.

⁵ *Frankford etc. Turnpike Co. v. R. R. Co.*, 54 Pa. St. 345; 93 Am. Dec. 708.

⁶ *International etc. R. R. Co. v. Dawson*, 62 Tex. 260.

⁷ *Louisville etc. R. R. Co. v. Sumner*, 106 Ind. 55; 55 Am. Rep. 719.

or of its agents and servants.¹ A regulation by a railroad company forbidding hackmen, peddlers, expressmen, and loafers from entering a passenger-room at the station is valid, but a hackman with a check for baggage may enter the baggage-room therefor.² A railroad has the right forcibly to eject from its premises a hotel-runner who comes there to solicit patronage for his hotel, in violation of a regulation of the company, of which he has knowledge.³

§ 563. **Use of Streets.**—A railroad has no right to use a street for its freight-yard.⁴ It may pass and re-pass over a highway in making up its trains and shifting its cars, if done only to a reasonable extent and in a reasonable manner.⁵

§ 564. **Crossing or Running in Highways.**—If a railway company lays its tracks in a street or public highway, it is bound to lay them in a proper manner, and to put and maintain the street or highway in as good repair as it was before;⁶ and for a failure in either of these respects the company is liable.⁷ Where a railway company is authorized to construct its line across a highway, it must be done with the least possible inconvenience to the public;⁸ and it is the duty of the company to keep the crossing in a safe condition.⁹ Where inconvenience to the public necessarily follows, the work must be performed

¹ *Macon etc. R. R. Co. v. McConnell*, 31 Ga. 133; 76 Am. Dec. 685.

² *Summitt v. State*, 8 Lea, 413; 41 Am. Rep. 637.

³ *Landrigan v. State*, 31 Ark. 50; 25 Am. Rep. 547.

⁴ *State v. R. R. Co.*, 27 Vt. 103; *Lackland v. R. R. Co.*, 31 Mo. 180; *Gahagan v. R. R. Co.*, 1 Allen, 187; 79 Am. Dec. 725.

⁵ *Gahagan v. R. R. Co.*, 1 Allen, 187; 79 Am. Dec. 725.

⁶ *Gear v. R. R. Co.*, 43 Iowa, 83; *Gale v. R. R. Co.*, 76 N. Y. 594; *Worster v. R. R. Co.*, 50 N. Y. 203.

⁷ *Louisville etc. R. R. Co. v. Phillips*, 112 Ind. 59; 2 Am. St. Rep. 155; *Kellinger v. R. R. Co.*, 50 N. Y. 206; *Gear v. R. R. Co.*, 43 Iowa, 83.

⁸ *Louisville etc. R. R. Co. v. State*, 3 Head, 523; 75 Am. Dec. 778; *Commonwealth v. R. R. Co.*, 27 Pa. St. 339; 67 Am. Dec. 471; *Queen v. Sharpe*, 3 Eng. Railw. Cas. 27.

⁹ *Pittsburg etc. R. R. Co. v. Dunn*, 56 Pa. St. 280; *Gale v. R. R. Co.*, 76 N. Y. 594; *Farley v. R. R. Co.*, 42 Iowa, 234; *State v. R. R. Co.* 74 N. C. 143; *Hurley v. R. R. Co.*, 1 Wils. (Ind.) 295.

with the least possible inconvenience. If a bridge or substituted road be necessary to prevent an obstruction of the highway, the company must build it within a reasonable time, and cannot delay until its road is completed, and this is the rule, whether the obstruction of the highway be expressly prohibited in the charter or not.¹ A provision in a charter requiring it to restore a highway which it crosses to its former state of usefulness, as near as may be, is not a condition precedent to its right to cross such highway.² If a railroad company constructs a bridge over a crossing, it is the duty of the company to maintain the same in repair;³ and this duty extends to the approaches to the bridge, as a part thereof, connecting it with the highway.⁴ Railroad companies may constitutionally be required to build and maintain highway crossings, although such liability is imposed by statute enacted subsequent to the chartering of such company.⁵ So a statute which imposes the duty on railroad companies to construct farm-crossings for the use of the owners of land adjoining their tracks is constitutional, even in respect to companies chartered before its passage.⁶ Where a railroad company constructs its road across a highway without lawful authority, or in a manner not authorized by law,⁷ the road is a nuisance, and the company is liable to indictment.⁸ It is not relieved of the obligation to keep a crossing in a safe condition, because of a slight deflection in the highway by the proper authorities, whereby the precise place of crossing was changed.⁹ The company is liable for unnecessary obstructions of the highway by its

¹ *Louisville etc. R. R. Co. v. State*, 3 Head, 523; 75 Am. Dec. 778.

² *Richardson v. R. R. Co.*, 25 Vt. 465; 60 Am. Dec. 283.

³ *Roe v. Elmendorf*, 52 How. Pr. 232.

⁴ *Hayes v. R. R. Co.*, 9 Hun, 63; *People v. R. R. Co.*, 74 N. Y. 302.

⁵ *Portland etc. R. R. Co. v. Inhabitants*, 78 Me. 67; 57 Am. Rep. 784.

⁶ *Ill. Cent. etc. R. R. Co. v. Wilkenborg*, 117 Ill. 203; 57 Am. Rep. 862.

⁷ *Com. v. R. R. Co.*, 2 Gray, 54; *Com. v. R. R. Co.*, 4 Gray, 22.

⁸ *Com. v. R. R. Co.*, 2 Gray, 54; *Com. v. R. R. Co.*, 4 Gray, 22; *Com. v. R. R. Co.*, 27 Pa. St. 339.

⁹ *People v. R. R. Co.*, 67 Ill. 118.

trains, or otherwise, at crossings.¹ Neither the public nor the railroad company have an exclusive right of passage at a crossing, but their rights are concurrent;² and reasonable care and prudence must be exercised by each, so as not to interfere unnecessarily with the other.³ The legislature of a state, in the exercise of the right of eminent domain, can authorize and empower a railroad corporation to cross another railroad or turnpike road, on making compensation; and the exercise of such a right, whatever damage may result therefrom, cannot be considered as a condemnation of a franchise, nor the impairment of a contract, within the meaning of the United States constitution.⁴

ILLUSTRATIONS.—By the first section of a city ordinance, a railroad company was authorized to build its road over and across certain streets of the city, provided it should be built "on the grade of the city." By the second section, the company was authorized to build a bridge across a river running through the city. *Held*, that the clause in the first section, relative to grade, did not prohibit the company from erecting suitable embankments above grade as approaches to the river, and that the company was not liable to a lot-owner for damages resulting from the erection of the embankment: *Slatten v. R. R. Co.*, 29 Iowa, 148; 4 Am. Rep. 205.

§ 565. Railroads in Streets—Powers of State and Municipality.—The legislature may authorize the building of a railroad in the streets or highways of a town or city,⁵ even without compensation to the municipality, and without its consent.⁶ But the power is usually delegated

¹ *Murray v. R. R. Co.*, 10 Rich. 227; 70 Am. Dec. 219; *Jonesville v. R. R. Co.*, 7 Wis. 484; *Veazie v. R. R. Co.*, 49 Me. 119; *Rauch v. Lloyd*, 31 Pa. St. 358; 72 Am. Dec. 747.

² *Penn. Co. v. Krick*, 47 Ind. 368; *North Penn. R. R. Co. v. Heileman*, 49 Pa. St. 60; 88 Am. Dec. 482. That the public use is subordinate to the right of the company to use its road, see *Ogle v. R. R. Co.*, 3 Houst. 267. Where the road of one railroad company crosses that of another, the rights of the former are made sub-

ordinate to those of the latter: *Pittsburg etc. R. R. Co. v. R. R. Co.*, 77 Pa. St. 173.

³ *Pittsburg etc. R. R. Co. v. Maurer*, 21 Ohio St. 421; *Toledo etc. R. R. Co. v. Shuckman*, 50 Ind. 42; *Gorton v. R. R. Co.*, 45 N. Y. 660.

⁴ *Baltimore and Havre de Grace Turnpike Co. v. R. R. Co.*, 35 Md. 224; 6 Am. Rep. 397.

⁵ *Tenn. etc. R. R. Co. v. Adams*, 3 Head, 596.

⁶ *Hine v. R. R. Co.*, 42 Iowa, 636.

to the municipality.¹ The grant of a right to build a railroad in a city street is not necessarily exclusive;² and under such a grant not exclusive, the legislature may lawfully authorize a second company to use the tracks of the first railroad, making compensation therefor.³ And city councils having a general power to authorize railroads to be laid in the streets may, although there is one track in a street, grant the right to construct another in the same street.⁴ And a street-railroad company cannot complain that another railroad track is allowed to cross theirs.⁵ Nor is the exclusive right to construct and operate a horse-railroad in a city infringed by the construction of a road in the same city to be operated by steam.⁶

§ 566. Street Railroads—Powers and Rights of.—The right to construct and operate a street-railroad in a city, and to take tolls from persons traveling on the same, is a franchise which the sovereign authority alone can grant.⁷ A city, by granting, in terms not exclusive, a right of way through the streets to a street-railroad company, does not preclude itself from subsequently granting a right to another company over that portion of the streets not actually covered by the tracks, etc., of the first company.⁸ After a grant, not irrevocable or exclusive, of authority to construct a street-railroad, the legislature may lawfully authorize a second corporation to use the same or to lay similar tracks through the same streets, making compensation for the use of the tracks of the first, without making any compensation for the diminution of its profits or the value of

¹ See Title Municipal Corporations, *post*.

² Brooklyn R. R. Co. v. R. R. Co., 35 Barb. 364.

³ Met. R. R. Co. v. R. R. Co., 118 Mass. 290.

⁴ Oakland R. R. Co. v. R. R. Co., 45 Cal. 365; 13 Am. Rep. 181.

⁵ Market Street R. R. Co. v. R. R.

Co., 51 Cal. 583; Brooklyn R. R. Co. v. R. R. Co., 33 Barb. 420.

⁶ Denver etc. R. R. Co. v. R. R. Co., 2 Col. 673.

⁷ Denver etc. R. R. Co. v. R. R. Co., 2 Col. 673.

⁸ Gulf City Street R. R. Co. v. R. R. Co., 65 Tex. 502.

its franchise.¹ The exclusive right to construct and operate a horse-railroad in a city is not infringed by constructing a road in the same city to be operated by steam,² nor by a cable tramway.³ In a statute prohibiting a horse-railroad company from laying a track in that portion of a street in which another railroad company has laid a track without the consent of such other company, the words "that portion of" a street mean the whole width of the street.⁴ A corporation chartered as a steam-railroad company or a horse-railroad company does not, by accepting the benefits of a city ordinance recognizing it as the latter, preclude itself from afterwards insisting on its original right to propel its cars by steam-power.⁵ A franchise to a street-railroad company authorizes it to use the street only in common with others.⁶ The business of the company in carrying passengers in cars over the streets must be conducted under the restrictions which govern natural persons transacting the same business.⁷ While a street-railroad company has a right to run its cars on a public street, yet the public have also a right to travel thereon, and the railroad company must exercise such care and precaution for the purpose of avoiding accidents and endangering property or person as a reasonable prudence would suggest. It has only an equal right with the traveling public to the use of the street where its track is laid, with a few exceptions; such as, that the cars run on a track, and when a vehicle meets a car, it must give way.⁸ A person is entitled to walk on a street-railroad track, using reasonable

¹ Metropolitan R. R. Co. v. R. R. Co., 118 Mass. 290.

² Denver etc. R. R. Co. v. R. R. Co., 2 Col. 673.

³ Omaha etc. R. R. Co. v. R. R. Co., 30 Fed. Rep. 324.

⁴ Forty-second Street R. R. Co. v. R. R. Co., 52 N. Y. Sup. Ct. 252.

⁵ McCartney v. R. R. Co., 112 Ill. 611.

⁶ Middlesex R. R. Co. v. Wakefield, 103 Mass. 261; Kellinger v. R. R. Co., 50 N. Y. 206.

⁷ Frankford etc. R. R. Co. v. Philadelphia, 58 Pa. St. 119; 98 Am. Dec. 242; Unger v. R. R. Co., 51 N. Y. 497; Barnes v. Dist. of Columbia, 1 McAr. 322.

⁸ Barker v. R. R. Co., 4 Daly, 274.

care and prudence to avoid injuries; but he is not required to abandon the track, in order to avoid possible injuries which may result from the carelessness of the company, and if he is injured by the carelessness of the company while walking on the track, the fact that he might have walked by the side of the track is not contributory negligence on his part.¹ Where the proprietors of a foundry gave notice to a street-railroad company that they were intending to haul a large boiler of about twenty-eight tons' weight through one of the streets occupied by the railroad, and would occupy the street and interrupt the running of cars for about two hours, and the railroad company applied for an injunction to prevent them from so doing, on the ground that they had a preferential right of way over their track, but it appeared upon the hearing that the boiler could be hauled without positive injury to the streets, and that the plan proposed by the defendants involved less inconvenience to the public, on the whole, than any other, the court refused to grant a preliminary injunction.² But the owner of a store has no such right to use the street in front thereof, by having drays and wagons, with teams attached, stand transversely upon the street while discharging goods, as will entitle him to recover against a horse-railroad company which has so constructed its track, under authority from the city, as to interfere with such use of the street; but he may be compelled, if public convenience requires it, to discharge the goods from wagons or drays standing lengthwise of the street.³ The municipal authorities have the power to regulate the manner in which the franchise of the company is to be exercised.⁴ When a company has the right to occupy the streets with its track, with-

¹ *Shea v. R. R. Co.*, 44 Cal. 414. See *post*, Division II., Negligence.

² *Second and Third Streets R. R. Co. v. Morris*, 8 Phila. 304.

³ *Hobart v. R. R. Co.*, 27 Wis. 194; 9 Am. Rep. 461.

⁴ *Middlesex R. R. Co. v. Wakefield*, 103 Mass. 261; *Frankford etc. R. R. Co. v. Philadelphia*, 58 Pa. St. 119; 98 Am. Dec. 242. See *Municipal Corporations*, *post*.

out the consent of the municipal authorities, the city cannot impose conditions upon the company, by an ordinance granting the right of way, which will be binding;¹ and where, under its charter, a street-railroad company has the right to lay its tracks through the streets of a city, the city cannot compel it to sign a contract imposing stipulations as to the manner of using streets, etc.² Where the charter requires the consent of a majority of the property holders along the route, their standing by without protest while the road is being constructed is evidence of consent.³ Where contributions are made to secure the building of a street-railroad, and the regular running of cars thereon a specified number of daily trips, the company receiving such contributions may stipulate that the damages for a failure to comply with these conditions shall be the sum contributed, and interest thereon from the date of failure.⁴

The company is bound to lay its tracks in a proper manner and to keep them in repair;⁵ and the obligation to repair extends to those parts of its road proximately connected with its track as well as to the track itself.⁶ Where a street-railroad company agreed to pave and keep the streets in repair "in and about the rails," it was held that the space between double tracts was embraced in that term.⁷ The duty under a contract with the city to pave the streets whereon its tracks were laid "in and about the rails," and to "keep the same in repair," is not affected by the fact that an adjoining lot-owner had a license from the city to dig a trench across part of the street and under the track to connect his lot with a sewer.⁸ Where a horse-railroad company has covenanted with a

¹ Council Bluffs v. R. R. Co., 45 Iowa, 338; 24 Am. Rep. 773.

² Frayser v. State, 16 Lea, 671.

³ Paterson etc. R. R. Co. v. Mayor, 24 N. J. Eq. 158.

⁴ Crown Hill R. R. Co. v. Armstrong, 39 Ind. 418.

⁵ Carpenter v. R. R. Co., 11 Abb.

Pr., N. S., 416; Fash v. R. R. Co., 1 Daly, 148; Rockwell v. R. R. Co., 53 N. Y. 625.

⁶ Conroy v. R. R. Co., 52 How. Pr. 49.

⁷ New York v. R. R. Co., 31 Hun, 241.

⁸ McMahon v. R. R. Co., 75 N. Y. 231.

city, as the express condition of and sole consideration for a grant to use its streets, to keep that portion of the same over which its tracks pass in repair, they thereby voluntarily assume the obligations which the city owed to the public as respects that portion of the street which is embraced between their tracks, and over which they have absolute and exclusive control, and are liable for injuries by reason of defects.¹ A requirement in a street-railroad charter to "keep the surface of the street inside the rails, and for two feet four inches outside thereof, in good repair," means two feet four inches on each side of the track.² A street-railroad cannot, by the constant and exclusive use of a part of a public street for a right of way, obtain the absolute ownership therein.³ A city ordinance requiring street-railroad companies to report quarterly the number of passengers carried is valid.⁴

ILLUSTRATIONS. — A street-railroad company acquired the right in 1874 to lay a double track through certain streets in Philadelphia; a single track was laid, and in 1880 the company proceeded to lay another. *Held*, that the right to do so had not been lost by delay in exercising it: *People's R. R. Co. v. Baldwin*, 14 Phila. 231. A municipal ordinance provided that the fare on any horse-railroad in the city should not exceed five cents. When it was enacted, the defendant was operating a single line of railroad; afterward, it constructed and operated other lines diverging from the main line. *Held*, that the ordinance did not confer the right, upon payment of five cents, to ride on a car bound for one terminus and at the point of divergence to take another car to a different terminus: *Ellis v. R. R. Co.*, 67 Wis. 135; 58 Am. Rep. 858. The act of incorporation of a street-railroad provided "that said company shall have exclusive power and authority to survey, lay out, construct, and equip, use, and employ street-railroads in the city of Atlanta, subject to the approval of the city council thereof for each route selected first had and obtained before the work thereon shall be commenced." *Held*, that no unconditional, exclusive power and authority to construct and use street-railroads in *all* the

¹ *McMahon v. R. R. Co.*, 11 Hun, Sup. Ct. 347.

² *Indianapolis etc. R. R. Co. v. Ross*, 47 Ind. 25.

³ *People v. R. R. Co.*, 41 Mich. 413.

⁴ *City of St. Louis v. R. R. Co.*, 89 Mo. 43; 58 Am. Rep. 82.

streets of the city was granted; but that the charter privilege applied only to such actual routes as might be selected by the company and approved by the council: *West End etc. R. R. Co. v. R. R. Co.*, 49 Ga. 151. A public street in a town ran through the yard of a railroad company. The town authorities granted to a street-car company the right to lay and operate their track through that street. *Held*, that the street-car company should not be enjoined from laying and using their track through the street in the yard: *Texas etc. R. R. Co. v. R. R. Co.*, 64 Tex. 80; 53 Am. Rep. 739. A statute provided that "no street-railroad shall hereafter be constructed in the city of St. Louis nearer to a parallel road than the third parallel street from any road now constructed, or which may hereafter be constructed, except the roads hereinbefore mentioned," among which was the A road. The B road, organized after the passage of this act, laid out its road so that its direction for nearly two miles was substantially the same as the A road, and for one half a mile both roads were exactly parallel and within one block of each other. *Held*, that the A road might enjoin the B road from constructing its road on said half-mile, without proving that any injury would be sustained by such construction, or, if sustained, that it could not be compensated in damages: *St. Louis R. R. Co. v. R. R. Co.*, 69 Mo. 65. A street-railroad company had contracted with a licensee company that the licensor should keep the pavement "within the tracks and three feet each side thereof" in repair. *Held*, that the licensee company was not bound to keep in repair a switch at a cross-walk: *Lowery v. R. R. Co.*, 76 N. Y. 28. A statute provides that a commutation check issued by a Boston horse-railroad company shall be good in another car between any two points, but not over the same route, "or a route parallel thereto, and between and including two common points." *Held*, that such a check is not good in another car whose route is substantially parallel, but which makes a wide detour between the two common points: *Cronin v. R. R. Co.*, 144 Mass. 249.

§ 567. Duties and Liabilities of.—A street-railroad accepts its charter on the implied condition that it will not injure others by the construction or maintenance of its road.¹ It must be maintained upon the most approved plans, and by the use of the common and approved means, with a view to the safety and convenience of the public traveling on the streets.² In the absence of any

¹ *Alton etc. R. R. Co. v. Deitz*, 50 Ill. 210; 99 Am. Dec. 509. ² *Fitts v. R. R. Co.*, 59 Wis. 323.

ordinance to the contrary, the reasonable speed of a street-car is the average rate of carriages used to convey passengers by horse-power.¹ No statute or ordinance otherwise requiring, a horse-car in a city may be run without a conductor.² In running its cars, a street-railroad company is not subject to the ordinary law of the road,³ and other vehicles must turn out of the way for its cars.⁴ But an individual has the right to walk on the track of a street-railroad,⁵ and is not required to abandon the track to avoid possible injuries which may result from the carelessness of the company.⁶ So if a street-car is stopped so as to obstruct the passage of a traveler on foot, he may rightfully step upon and pass over the platform of the car, in order to avoid the obstruction.⁷ A street-railroad company may exclude competing vehicles—as a line of stages—from the habitual use of the track.⁸ It has a right to remove the snow from its track, and put it upon another part of the street.⁹ But in clearing the snow from its track it is bound to dispose of it so as not to interfere unnecessarily with the safety and convenience of persons using the street, and in case of extraordinary snow-falls, must use extraordinary efforts to that end.¹⁰ It cannot be charged as matter of law that the disposition of snow cleared from a horse-railroad track in a public street in such a way as to raise the road level above the track was unlawful.¹¹ But in removing snow from its track, it must be careful not to interfere with the natural flow of water from the street, either by obstructing the gutter, or other-

¹ *Adolph v. R. R. Co.*, 76 N. Y. 530.

² *Dunn v. R. R. Co.*, 21 Mo. App. 188.

³ *Barker v. R. R. Co.*, 4 Daly, 274.

⁴ *Com. v. Temple*, 14 Gray, 69; *Jersey City R. R. Co. v. R. R. Co.*, 20 N. J. Eq. 61; *Camden R. R. Co. v. Citizens' Coach Co.*, 28 N. J. Eq. 145; *Whitaker v. R. R. Co.*, 51 N. Y. 295; *Adolph v. R. R. Co.*, 65 N. Y. 554; *Jatho v. R. R. Co.*, 4 Phila. 24.

⁵ *Kansas City R. R. Co. v. Pointer*, 9 Kan. 620.

⁶ *Shea v. R. R. Co.*, 44 Cal. 414.

⁷ *Shea v. R. R. Co.*, 62 N. Y. 180; 20 Am. Rep. 430.

⁸ *Citizens' Coach Co. v. R. R. Co.*, 33 N. J. Eq. 267; 36 Am. Rep. 542.

⁹ *Short v. R. R. Co.*, 50 Md. 73; 33 Am. Rep. 298.

¹⁰ *Bowen v. R. R. Co.*, 54 Mich. 496; 52 Am. Rep. 822.

¹¹ *Wallace v. R. R. Co.*, 58 Mich. 231.

wise, but it is not obliged to haul the snow away, and is only liable in case it has failed to exercise ordinary care.¹

§ 568. Dissolution of Railroad Corporation. — A railroad corporation may be dissolved in general in the modes in which other corporations organized for profit are dissolved.² If the act of incorporation itself fixes a definite time at which the charter shall expire, when that time arrives, the company is of course dissolved.³ A railroad company may voluntarily abandon its charter and dissolve itself, except so far as creditors have a right to object, and so far as the company's obligation to the public to exercise its franchise may interfere.⁴ But a railroad has not an option to discontinue part of its road and forfeit its franchise. The remedy, however, is not by action in equity for a specific performance, but by *mandamus* or indictment, or, at the election of the people, by action to annul the charter of the corporation.⁵ The charter may be repealed by the legislature, by an amendment, accepted by the company, reserving the power, although the charter was before irrevocable.⁶ It is not every neglect of a railroad company to perform the duties imposed by its charter that will operate as a forfeiture of its franchises.⁷ To warrant a forfeiture, there must be some positive act in violation of the charter, and in derogation of public right, willfully done.⁸ It does not necessarily forfeit its charter where, under legislative authority, it conveys its road to another corporation.⁹ Where a street-railroad company, after using a double track for seven years, removed it and laid down a single one, which sufficed for ten years, when,

¹ *Short v. R. R. Co.*, 50 Md. 73; 33 Am. Rep. 298.

² See *Title Corporations*, *ante*.

³ *La Grange etc. R. R. Co. v. Rainey*, 7 Cold. 420.

⁴ *Lauman v. R. R. Co.*, 30 Pa. St. 42.

⁵ *People v. R. R. Co.*, 24 N. Y. 261; 82 Am. Dec. 295.

⁶ *Mobile etc. R. R. Co. v. State*, 29 Ala. 573.

⁷ *Harris v. R. R. Co.*, 51 Miss. 602.

⁸ *State v. Pawtuxet Turnpike Co.*, 8 R. I. 182; *Miss. etc. R. R. Co. v. Cross*, 20 Ark. 443; *Commonwealth v. R. R. Co.*, 12 Gray, 180; *Eastern Archipelago Co. v. Regina*, 2 El. & B. 857; 22 Eng. L. & Eq. 328.

⁹ *State v. R. R. Co.*, 35 Minn. 222.

the business again requiring a double one, it proceeded to re-lay one, it was held that there was no ground of forfeiture for non-user.¹

A mere failure on the part of the company to file a survey and map of the route of its road within the time allowed by the charter for doing so ought not to be deemed a sufficient ground of forfeiture.² But a forfeiture is incurred by its abandonment of part of its road after its completion between the points named in its charter.³ A railroad corporation is not dissolved by a lease of its road for the term of the charter,⁴ nor by the sale of its rolling stock and personal property,⁵ nor by the sale of the road itself,⁶ although these might be grounds of forfeiture.⁷ Whether the consolidation of two railroad companies works a dissolution of both, and the creation of a new corporation, is held to depend upon the legislative intent manifested in the statute under which the consolidation takes place.⁸ Where a grant of land and connected franchises is made to a corporation for the construction of a railroad by a statute which provides for their forfeiture upon failure to perform the work within a prescribed time, the forfeiture may be declared by legislative act, without judicial proceedings to ascertain and determine the failure of the grantee.⁹ The receiver or assignee of a railroad company, appointed in involuntary bankruptcy proceedings, is not the agent of the corporation, so as to render it liable for injuries caused by his negligence while operating the road.¹⁰

§ 569. Remedies against Railroad Companies.—Where the company has been guilty of negligence or want of care

¹ *Hestonville Pass. R.R. Co. v. Philadelphia*, 89 Pa. St. 210.

² *Harris v. R. R. Co.*, 51 Miss. 602.

³ *People v. R. R. Co.*, 24 N. Y. 261; 82 Am. Dec. 295.

⁴ *Troy etc. R. R. Co. v. Kerr*, 17 Barb. 581.

⁵ *Bruffett v. R. R. Co.*, 25 Ill. 353.

⁶ *Bruffett v. R. R. Co.*, 25 Ill. 353.

⁷ *Arthur v. Bank*, 9 Smedes & M. 394; 48 Am. Dec. 719; *State v. Tp. Co.*, 8 R. I. 521.

⁸ *Central R. R. Co. v. Georgia*, 92 U. S. 665.

⁹ *Farnsworth v. R. R. Co.*, 92 U. S. 49.

¹⁰ *Metz v. R. R. Co.*, 58 N. Y. 61; 17 Am. Rep. 201.

in the exercise of its franchise or rights, an action at law is the ordinary remedy of the party injured.¹ It may be sued in trespass for an assault and battery.² An action will not lie against a railroad company for damages sustained by the abandonment of an old line, or the withdrawal of its trains therefrom, in the absence of a contract between the railroad and the complainant that the company should continue to maintain its road or to run its trains. Nor will the action lie for breach of duty, unless the party complaining can show that the duty was imposed for his benefit, and not for another, or for the public, his own advantage being merely incidental.³ An action lies against a railroad company for unlawfully entering upon and appropriating land for its road.⁴ But, as a general rule, where the company proceeds, in the exercise of the right of eminent domain, to take land for railroad right of way, the remedy provided by statute for the assessment of damages is exclusive of all other remedies for that purpose, and the land-owner cannot resort to a common-law action.⁵ A railroad company may be restrained by injunction from laying its track in a public street without first taking steps to acquire the right of way by the assessment and payment of damages to the owners of lots bounded by the street.⁶ For wrongfully refusing to receive and transport freight, a railroad company is liable in an action at law at the suit of the party aggrieved, and the remedy is not by *mandamus*.⁷

Where a land-owner relinquishes his right of way over his land to a railroad company, on its engagement to locate the depot on a certain spot, his remedy for the failure

¹ Perley v. R. R. Co., 57 N. H. 212; Little Miami R. R. Co. v. Naylor, 2 Ohio St. 235; 59 Am. Dec. 667; Tenn. etc. R. R. Co. v. Adams, 3 Head, 596.

² Mason v. R. R. Co., 31 Me. 215.

³ Kinealy v. R. R. Co., 69 Mo. 658.

⁴ Sherman v. R. R. Co. 40 Wis. 645; Kan. P. R. R. Co. v. Hopkins, 18 Kan. 494; R. R. Co. v. Kernodle, 54 Ind. 314; Powers v. Hurmest, 51 Mo. 136.

⁵ Tenn. etc. R. R. Co. v. Adams, 3 Head, 596; Sherman v. R. R. Co., 40 Wis. 645; East and West India etc. R. R. Co. v. Gattke, 3 Macn. & G. 155. But compare Kennet Nav. Co. v. Witherington, 18 Q. B. 531.

⁶ Ford v. R. R. Co., 14 Wis. 609; 80 Am. Dec. 791.

⁷ People v. R. R. Co., 22 Hun, 533. See post, Title Bailments — Carriers.

of the company to do so is by action for the breach of contract, or by suit for specific performance.¹ In a Missouri case the plaintiff executed and delivered to the agent of the lessor of the defendant, a railroad company, a written license to construct its road across his land, which license was not to be delivered to the company until it should comply with the law in regard to fences, cattle-guards, and farm-crossings. The company having constructed its road, without objection being made, across the plaintiff's land, and having failed to comply with these conditions, the plaintiff brought ejectment. The supreme court held that this was not the proper remedy. The agreement to construct fences, etc., was a condition subsequent, and the plaintiff might maintain a suit for specific performance, or for damages.² So where land is conveyed to a railroad on condition that it will erect and maintain a fence on both sides of the track through the land, and it fails to do so, the donor may sue for damages, or he may build the fence himself and sue the railroad for the price, or he may sue for specific performance.³ And such a covenant will run with the land, and the right to sue for its breach will pass to the grantee of the original grantor.⁴ In Iowa, where a railroad took land of a private person without tendering compensation, it was held that he might maintain ejectment against the corporation.⁵ In some cases, relief against a railroad company must be sought in a court of equity; as where the company is acting in excess of its powers, and an injunction is issued to restrain it.⁶ So if the company neglect to pay the damages awarded to the land-owner for the right of way, it may be restrained by injunction from using the land until the damages are paid.⁷

¹ Hubbard v. R. R. Co., 63 Mo. 68.

² Baker v. R. R. Co., 57 Mo. 265;
Provolt v. R. R. Co., 57 Mo. 256.

³ Baker v. R. R. Co., 57 Mo. 265.

⁴ 1 Smith Lead. Cas. 124, 139.

⁵ Daniels v. R. R. Co., 35 Iowa, 129;
14 Am. Rep. 490.

⁶ Stone v. R. R. Co., 9 Sim. 621;

Sanford v. R. R. Co., 24 Pa. St. 378;

Bohlman v. R. R. Co., 30 Wis. 105;

Prime v. R. R. Co., 1 Abb. N. C. 63;

Com. v. R. R. Co., 24 Pa. St. 159; 62

Am. Dec. 372.

⁷ Ross v. R. R. Co., 2 N. J. Eq. 422.

PART IV.—GAS COMPANIES.

CHAPTER XXXI.

GAS COMPANIES.

- § 570. Status of gas companies — Powers and liabilities generally.
- § 571. Officers and agents.
- § 572. Powers and liabilities of municipal corporations.
- § 573. Use of public highway.
- § 574. Duty to supply gas to all.
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- § 577. Duty of gas company — Liability for negligence.
- § 578. Contributory negligence.
- § 579. Right of company to sue liability and to be sued.

§ 570. Status of Gas Companies — Powers and Liabilities Generally. — Gas companies, it has been laid down, are neither public nor *quasi* public corporations.¹ Any one, it is said in a New Jersey case, may engage in the making and selling of gas without legislative authority.² So a city has a right to manufacture and distribute illuminating gas.³ The company must be lawfully organized;⁴ though in the election of its officers the court will rarely interfere.⁵ It can legally act only at a meeting of the directors, after notice, at which a quorum is present.⁶ It has no right in paying its debts to prefer a director,⁷ nor can it contract with a director,⁸ nor pay him for his services

¹ *Com. v. Lowell G. L. Co.*, 12 Allen, 75; *New York etc. R. R. Co. v. Metropolitan G. L. Co.*, 5 Hun, 201; 63 N. Y. 326; *McCune v. Norwich Gas Co.*, 30 Conn. 521; 79 Am. Dec. 278; *People v. Mutual Gas Co.*, 38 Mich. 154.

² *Jersey City Gas Co. v. Dwight*, 29 N. J. Eq. 242; *Pudsey Coal Gas Co. v. Bradford, L. R.* 15 Eq. 167.

³ *Strawbridge v. Philadelphia*, 13 Rep. 216. A gas company is not a

"manufacturing company": *Ottawa Gas etc. Co. v. Donney*, Ill. 1889.

⁴ *Fletcher v. Gas Co.*, 8 Phila. 559.

⁵ *Waudsworth etc. Gas Co. v. Wright*, 18 Week. Rep. 728.

⁶ *Fisher v. Gas Co.*, 1 Pearson, 118.

⁷ *Gas Light etc. Co. v. Terrell, L. R.* 10 Eq. 168.

⁸ *Ex parte Stears, Johns*. (Eng. Ch.) 480; *Stears v. South Essex Gas Co.*, 9 Com. B., N. S., 180.

as such.¹ But it may mortgage its property to secure a debt,² and may issue bonds.³ It may grant an annuity to a clerk.⁴ A gas company is not a "person to whom rent is due" under the English bankruptcy act.⁵ Railroad companies and hotels are not the "public" within a statute.⁶ A gas company, having an exclusive right to make and sell gas in a city, may make a valid contract permitting another company to compete with it in the same business; but a contract made by it to discontinue the manufacture and sale of gas in the city or a portion thereof is void.⁷ A corporation empowered to act as a contractor or builder for itself or others, and to buy, maintain, or manage any work, public or private, tending to develop or facilitate "trade, travel, transportation, and conveyance of freight, live-stock, passengers, or any other traffic," and with power to exercise the right of eminent domain, may engage in the production, distribution, and supply of natural gas.⁸

§ 571. **Officers and Agents.**—The company is, of course, liable for the negligence of its servants in the line of their duty.⁹ The president of a gas company has authority to purchase goods used in the construction of the works.¹⁰ On a sale of property by the president to the company, the notice of the former as to defects in the title is not notice to the company.¹¹ The president has

¹ *Dunston v. Imperial Gas Co.*, 3 Barn. & Adol. 125.

² *Davidson v. Westchester Gas Light Co.*, 99 N. Y. 558.

³ *Davidson v. Westchester Gas Light Co.*, 99 N. Y. 558.

⁴ *Clarke v. Gas Co.*, 1 Nev. & M. 206; 4 Barn. & Adol. 315.

⁵ *In re Roberts*, L. R. 6 Ch. Div. 63.

⁶ *Imperial Gas Co. v. West London Gas Co.*, 15 L. T., N. S., 66; 14 Week. Rep. 1019.

⁷ *Chicago Gas Light Co. v. People's Gas Co.*, 121 Ill. 530; 2 Am. St. Rep. 124; and see *Gibbs v. Consolidated Gas Co.*, U. S. Sup. Ct. 1889.

⁸ *Carothers's Appeal*, 118 Pa. St. 468.

⁹ *Lannen v. Gas Light Co.*, 46 Barb. 264; 44 N. Y. 459; *Flint v. Gas Co.*, 3 Allen, 343; 52 Hun, 26; *Smith v. Gas Co.*, 1 Ad. & E. 526; *Devine v. Gas Co.*, 25 Id. 231.

¹⁰ *Brown v. Gas Light Co.*, 21 Wis. 51. A gas company has power to borrow money and secure the payment by note and mortgage for the purpose of its business: *Hays v. Galcon Gas Light Co.*, 29 Ohio St. 330.

¹¹ *Barnes v. Gas Light Co.*, 27 N. J. Eq. 33.

no implied power to release subscriptions to stock.¹ A superintendent has authority to waive a regulation requiring applications for gas to be in writing.² A book-keeper and collector has no authority to make admissions or statements as to the location of the company's pipes.³

§ 572. Powers and Liabilities of Municipal Corporations. — The legislature may give one gas company the exclusive right to manufacture and sell gas in a city or town for a certain term.⁴ But a municipality cannot do this without express legislative authority.⁵ A municipality has power to lay gas pipes in its streets, and to supply gas to its citizens,⁶ or it may become a stockholder of a gas company.⁷ It has power to make contracts for the supply of gas to it by a company,⁸ provided the term of the contract is not of too long duration.⁹ A city may authorize a company to lay its pipes in its streets without compensation to it for such use.¹⁰ But a municipality, without legislative authority, has no power to grant this right on condition that gas shall be furnished to it at a certain rate.¹¹ A contract between a gas company and a municipality, that the latter will pay the former for the privilege of opening the highway in which its pipes are placed, is valid.¹² Where in its charter the legislature reserves the

¹ *Custar v. Titusville Gas Works*, 63 Pa. St. 381.

² *Shepherd v. Gas Co.*, 11 Wis. 234.

³ *Dav. Cent. R. R. Co. v. Davenport Gas Light Co.*, 43 Iowa, 301.

⁴ *Crescent etc. Gas Co. v. New Orleans etc. Gas Co.*, 27 La. Ann. 138; *State v. Milwaukee Gas Light Co.*, 29 Wis. 454; 9 Am. Rep. 598; *contra*, *Norwich Gas Light Co. v. Norwich City Gas Co.*, 25 Conn. 19; see *Des Moines Gas Co. v. City*, 44 Iowa, 505; 24 Am. Rep. 756.

⁵ *State v. Cincinnati etc. Gas Co.*, 18 Ohio St. 262.

⁶ *Strawbridge v. Philadelphia*, 13 Rep. 216.

⁷ *City of Memphis v. Memphis Gas Co.*, 9 Heisk. 531.

⁸ *City of Indianapolis v. Indianapolis Gas Light Co.*, 66 Ind. 396; *San Francisco Gas Co. v. City*, 6 Cal. 190; 9 Cal. 453; *Harlam Gas Light Co. v. Mayor of N. Y.*, 33 N. Y. 309; *City of St. Louis v. St. Louis Gas Light Co.*, 70 Mo. 69; 5 Mo. App. 484; *East St. Louis v. East St. Louis Gas Co.*, 98 Ill. 415; 38 Am. Rep. 97.

⁹ *East St. Louis v. East St. Louis Gas Co.*, 98 Ill. 415; 38 Am. Rep. 97; *Garrison v. Chicago*, 7 Biss. 480.

¹⁰ *Smith v. Gas Light Co.*, 12 How. Pr. 187.

¹¹ *Elmira Gas Co. v. City of Elmira*, 2 Alb. L. J. 392.

¹² *Edgware Highway Board v. Harrow Dist.*, L. R. 10 Q. B. 92.

right to "alter, modify, or repeal" it, it may give a city council a right to regulate the price of gas to be charged by the company. But such regulation must be reasonable and *bona fide*.¹ So where there is no reference or restriction in the charter as to the price.² An agreement between a city and a gas company for the supply of gas for a longer period than that authorized by law will not affect the right of the city to fix the price after the expiration of the legal time.³ The following municipal ordinance as to gas companies has been held reasonable, viz.: That no paved street shall be opened for laying mains or pipes between December 1st and March 1st.⁴ And the following has been held unreasonable, viz.: That no paved street shall be dug up for the purpose of introducing gas into any premises on the opposite side of the street to that on which the gas pipes are laid.⁵ A statute creating the office of inspector of gas meters, whose salary is to be paid by assessment on all the gas companies in the state, is constitutional.⁶ A contract between a municipality and a gas company, for the supply of gas to it, cannot be impaired by the former because it would be for the benefit of the citizen to do so. In making such contracts, the municipality acts as a private corporation, and not as a local sovereign.⁷ A contract made by a city giving a certain company the sole right for a term of laying its pipes, and supplying the city with gas in consideration of receiving the gas at half the price charged the public, does not estop the city from becoming a stockholder in a new company, whose object is to introduce gas into the same city.⁸ That the municipality has no right to raise money

¹ *State v. Cin. Gas Co.*, 18 Ohio St. 262.

² *State v. Columbus Gas Light Co.*, 34 Ohio St. 572; 32 Am. Rep. 390; *State v. Ironton Gas Co.*, 37 Ohio St. 45.

³ *State v. Ironton Gas Co.*, 37 Ohio St. 45.

⁴ *Comm'r's v. Northern Liberties Gas Co.*, 12 Pa. St. 318.

⁵ *Comm'r's v. Northern Liberties Gas Co.*, 12 Pa. St. 318.

⁶ *Cin. Gas etc. Co. v. State*, 18 Ohio St. 237.

⁷ *Western Sav. Fund Soc. v. Philadelphia*, 31 Pa. St. 175; 72 Am. Dec. 730; *Nebraska City v. Neb. Gas Light Co.*, 9 Neb. 339.

⁸ *Memphis City v. Dean*, 8 Wall. 64.

to pay for gas supplied, is no answer to a suit under a binding contract made by it;¹ nor that its promise to pay for it out of a certain fund was illegal and *ultra vires*.² No action lies against a city council for refusing to give the plaintiff the contract for lighting the city, it being the lowest bidder.³

ILLUSTRATIONS.—A city authorized a gas company to lay pipes in its streets upon condition that it would not enter into combination with any other gas company as to rates to be charged. The company agreed with another in the same city for a division of the territory to be lighted. *Held*, a violation of the condition; but that it did not work a forfeiture of the company's rights to use the streets: *City of Detroit v. Mutual Gas Co.*, 43 Mich. 594. A gas company made a contract with a city to supply it with gas, for a certain time, at a certain price. Subsequently, litigation arose between the parties concerning the validity of the contract, pending the decision of which, it was agreed between them that the company should have the right to shut off the gas from the public lamps until the validity of the contract was decided, the rights of both parties not to be affected by said action. The court sustained the validity of the contract, and the company sued for the profits on the gas it had not supplied. *Held*, that it could recover: *Davenport Gas Co. v. City of Davenport*, 15 Iowa, 6. A gas company was authorized by a city to erect works, and occupy its streets for the purpose of laying pipes and gas mains. The city fixed the price of gas, and directed the manner of laying mains, as it had authority to do; and from time to time made contracts with the company for lighting the streets. The last contract made fixed the price of gas for public and private consumption for a period of five years, and required of the company, as a condition precedent, that it should lay pipes for public lighting along streets where for long distances there was no private consumption. *Held*, that as the company did not have the exclusive right to the use of the streets for laying gas pipes, and the city was under no obligation to purchase gas from the company, the city might at the end of the five years build its own gas works: *Hamilton Gas Light Company v. Hamilton*, 37 Fed. Rep. 000.

§ 573. **Use of Public Highways.**—The state alone, it is held, can give the right to use the streets of a city for

¹ *Davenport Gas Co. v. City of Davenport*, 13 Iowa, 229; *New York Gas Co. v. New York*, 49 How. Pr. 277.

² *Nebraska City v. Neb. etc. Gas Co.*, 9 Neb. 339.

³ *East River Gas Co. v. Donnelly*, 25 Hun, 614.

laying gas pipes.¹ But such right, when given, is not a mere license: it is a franchise which will pass by mortgage or sale.² The legislature may authorize a gas company to take private property for laying its pipes, etc. Such a use is a "public use" within the constitution.³ But the laying of gas pipes in a street is not a new use for which "taking" adjacent owners may claim damages.⁴ But a person may recover for damage to his property or land by escaping gas.⁵ Under the English statute, the company may lay its pipes under a footway as well as in the streets,⁶ or private roads not yet dedicated.⁷ But it may not lay any pipe in, through, or against any building or private land without the consent of the owner.⁸ "Common gas" in a statute means gas of twelve-candles power, and "cannel gas," that of twenty-candles illuminating power.⁹ Where the company is permitted to break up the streets to lay its pipes, on the consent being given of certain officers, if it obtains one consent it need not afterwards obtain it again when it wishes to lay new pipes.¹⁰ A verbal license by the owner of land to lay a gas pipe through his land is, after it has incurred expense in so doing, irrevocable.¹¹ A company has a right to get at its pipes in a street, even though a railroad track has been

¹ *Jersey City Gas Co. v. Dwight*, 29 N. J. Eq. 242; *State v. Cin. Gas Co.*, 18 Ohio St. 262; and see *Boston v. Richardson*, 13 Allen, 160.

² *City of Brooklyn v. Jourdan*, 7 Abb. N. C. 23; but see *People v. Gas Light Co.*, 38 Mich. 154; *City of Brooklyn v. Fulton etc. Gas Co.*, 7 Abb. N. C. 19. Whether a gas company has a right to use the gutters of a city for carrying away its refuse has been doubted: *New Orleans v. Gas Light Co.*, 5 La. Ann. 439.

³ *Bloomfield etc. Gas. Co. v. Richardson*, 63 Barb. 437; *People v. Bowen*, 30 Barb. 24; 21 N. Y. 517.

⁴ *Boston v. Richardson*, 13 Allen, 160; *Providence Gas Co. v. Thurber*, 2 R. I. 15; 55 Am. Dec. 621. But *aliter* as to a county highway: *Bloomfield*

etc. Gas Co. v. Calkins, 1 N. Y. Supreme Ct. (T. & C.) 541; 62 N. Y. 386; *Galbreath v. Armour*, 4 Bell App. Cas. 374; *Chapman v. Cray's Gas Co.*, 13 Gas J. 448; *Greenough*, 82.

⁵ *Bloomfield etc. Gas Co. v. Calkins*, 1 N. Y. Supreme Ct. (T. & C.) 549; and see *Holt v. Gas Co.*, L. R. 7 Q. B. 728.

⁶ *Mitcham Gas Co. v. Wimbledon Board*, 30 Gas J. 600; *Greenough*, 152.

⁷ *Selby v. Gas Co.*, 30 Beav. 606.

⁸ *Thompson v. Sunderland Gas Co.*, L. R. 2 Ex. Div. 429.

⁹ *Gas Light and Coke Co. v. Vestry*, 42 L. J., N. S., 50.

¹⁰ *Dover Gas Co. v. Mayor*, 7 De Gex, M. & G. 545.

¹¹ *Rome Gas Light Co. v. Meyerhardt*, 61 Ga. 287.

laid over them, unless it has wrongly represented the location of the pipes to the railroad.¹ But the right of a company to the use of the street may be inquired into by the municipality, even after the lapse of twenty years.² A company disturbing the streets or highways for the purpose of laying pipes, without legal authority so to do, will be prevented by injunction.³

§ 574. **Duty to Supply Gas to All.** — In the absence of a contract or a statutory or charter obligation, it has been laid down in several cases, that a gas company is not obliged to supply gas to all who apply, even when they are ready to comply with all the regulations of the company. The *status* of the company, it is said, is simply that of any other vendor, who may sell to whom he pleases and refuse whom he pleases.⁴ But other cases hold, and upon good and satisfactory grounds, that a gas company is so far a public agency that it is bound to supply gas to all persons applying and offering payment or reasonable security therefor.⁵ And this doctrine has been applied in other cases where the company had been given the exclusive right of supplying gas in a city for a certain time.⁶ Cutting off gas after previously supplying it is refusing to supply it within a statute.⁷ Damages for the

¹ Davenport Cent. R. R. Co. v. Davenport Gas Co., 43 Iowa, 301.

² State v. Cincinnati Gas Light Co., 18 Ohio St. 262.

³ City of Brooklyn v. Gas Co., 7 Abb. N. C. 19; Jersey City Gas Co. v. Dwight, 29 N. J. Eq. 242; *aliter* in England: Atty.-Gen. v. Cambridge Gas Co., L. R. 4 Ch. 71; Atty.-Gen. v. Sheffield Gas Co., 3 De Gex, M. & G. 304; Sheffield Gas Co. v. Gas Co., 2 Gas J. 360; Greenough, 80; Chartered Gas Co. v. Great Central etc. Gas Co., 1 Gas J. 322; Greenough, 81.

⁴ McCune v. Norwich etc. Gas Co., 30 Conn. 521; 79 Am. Dec. 278; Pater-son etc. Co. v. Brady, 27 N. J. L. 245; 72 Am. Dec. 360; Hoddeson G. & C. Co. v. Haselwood, 6 C. B., N. S., 237; Com. v. Lowell Gas Light Co., 12 Allen,

75; Houlgate v. Surrey Gas Co., 8 Gas J. 261; Greenough, 168; Com. Bank v. London Gas Co., 20 U. C. Q. B. 233.

⁵ Williams v. Mutual Gas Co., 52 Mich. 499; 50 Am. Rep. 266; Gas Light Co. v. Colliday, 25 Md. 1; Chicago Gas Light Co. v. Gas Light Co., 121 Ill. 530; 2 Am. St. Rep. 124.

⁶ New Orleans Gas Co. v. Paulding, 12 Rob. (La.) 378; Shepard v. Milwaukee Gas Co., 6 Wis. 539; 70 Am. Dec. 479; Com. Gas Co. v. Scott, L. R. 10 Q. B. 400; People v. Manhattan Gas Light Co., 45 Barb. 136.

⁷ Com. Gas Co. v. Scott, L. R. 10 Q. B. 400; Meiers v. Gas Co., 11 Daly, 119. An injunction will be granted to restrain the cutting off of gas during the currency of a quarter, the party

loss of profits of business necessarily caused by a gas company's wrongful refusal to supply a store with gas may be recovered against it; and therefore, in an action against the company for such wrongful refusal, evidence by the plaintiff to show the nature and extent of his business, and that the want of gas would tend to prevent customers from coming to his store, is admissible.¹ So the jury may consider the depreciation of the estate for sale or rental, by the gas being cut off, and the cost of removing the gas fixtures and restoring the premises.² But in New York it was held that the keeper of a boarding-house could not recover for the loss of profits which she claimed because of boarders leaving her house.³ A demand for gas and tender of payment need not be repeated monthly in order that an applicant may be entitled to recover damages during all the time the gas was wrongfully withheld from him, when the rules of the company did not require payment for gas in advance, but that bills should be paid on the first of each month, and the company refused to furnish him with gas solely because he refused to sign an agreement to abide by certain illegal rules and regulations of the company.⁴ The company must make from time to time, at its own cost, such changes in the location of its pipes as the public convenience requires.⁵ It must supply the gas within a reasonable time after it is demanded.⁶ But it is not bound to furnish a separate meter for each floor of the house, unless the owner or occupant puts in separate service pipes to connect with the meter;⁷ nor to place stop-cocks in its pipes outside buildings.⁸

having paid the rent for the preceding quarter: *Smith v. London Gas Co.*, 7 Grant (U. C.) 112.

¹ *Shepard v. Gas Light Co.*, 15 Wis. 318; 82 Am. Dec. 679.

² *Gas Light Co. v. Colliday*, 25 Md. 1.

³ *Morey v. Metropolitan Gas Co.*, 38 N. Y. Sup. Ct. 185.

⁴ *Shepard v. Gas Light Co.*, 15 Wis. 318; 82 Am. Dec. 679.

⁵ *In re Deering*, 93 N. Y. 361.

⁶ *Bedding v. Imp. Gas Co.*, 7 Gas J. 418; *Greenough*, 173.

⁷ *Ferguson v. Met. Gas Light Co.*, 37 How. Pr. 189.

⁸ *Holden v. Gas Co.*, 3 Com. B. 1.

§ 575. Right to Establish Reasonable Regulations.—
What are Reasonable and Unreasonable Regulations.—
 The company has a right to establish reasonable regulations in its business, to protect itself and its other customers.¹ Thus the following regulations have been held reasonable and valid, viz.: a regulation requiring the applicant to give security for the payment of the gas to be supplied;² a regulation requiring the applicant, for the like purpose, to make a money deposit with the company;³ that all governors or regulators shall be attached either to the gas pipes or the meter, unless placed upon a by-pass in such a way that the flow of the gas may be directed through the pipes without its passing through the governor or regulator.⁴ And the following regulations have been held unreasonable and invalid, viz.:⁵ a regulation reserving to the company the right at any time to cut off the connection with the service pipe, if it shall find it necessary so to do, to protect the works against abuse or fraud.⁶

§ 576. Invalid Grounds for Refusing to Supply Gas to Customer.—The company has no right to refuse to supply gas to a person because he will not sign an agreement which it has no right to compel him to sign;⁷ nor can it refuse to supply a customer because he refuses to pay a former bill, or a bill for gas used in other premises;⁸ or

¹ *Shepard v. Milwaukee Gas Co.*, 6 Wis. 539; 70 Am. Dec. 479.

² *Williams v. Mutual Gas Co.*, 52 Mich. 499; 50 Am. Rep. 266; *Shepard v. Milwaukee Gas Co.*, 6 Wis. 539; 70 Am. Dec. 479; *Dicks v. Equitable Gas Co.*, 8 Gas J. 328; *Greenough*, 170.

³ *Williams v. Mutual Gas Co.*, 52 Mich. 499; 50 Am. Rep. 266; *Shepard v. Milwaukee Gas Co.*, 6 Wis. 539; 70 Am. Dec. 479; *Wright v. Colchester Gas Co.*, 30 Gas J. 336; *Greenough*, 155; *Littlewood v. Gas Co.*, 8 Gas J. 541; *Greenough*, 171; *Ford v. Gas Co.*, 3 Hun, 621. But not where the charter or statute gives no such authority:

Spratt v. Met. Gas Co., 7 Gas J. 663; *Greenough*, 172.

⁴ *Foster v. Trustees*, 12 Phila. 511.

⁵ For other invalid rules, see next section.

⁶ *Shepard v. Milwaukee Gas Co.*, 6 Wis. 539; 70 Am. Dec. 479.

⁷ *Shepard v. Milwaukee Gas Co.*, 15 Wis. 318; 82 Am. Dec. 679; 6 Wis. 539; 70 Am. Dec. 479.

⁸ *Gas Light Co. v. Colliday*, 25 Md. 1; *Lloyd v. Washington etc. Co.*, 1 Mackey, 331. But see *People v. Manhattan Gas Light Co.*, 45 Barb. 136; 30 How. Pr. 87.

because there are arrears due from a former occupant of the premises;¹ nor because (under a statute) the consumer had not paid for gas supplied to him for a special illumination, and not in the ordinary course of business;² nor because he will not subscribe to a regulation authorizing it by its inspector to have free access at all times to the building or dwelling, to examine the apparatus, and remove the meter and service pipe;³ nor because he will not make a deposit unreasonable in amount;⁴ nor has the company any right to cut off the supply of gas, because the customer refuses to pay a bill which he claims is exorbitant.⁵

ILLUSTRATIONS.—On demanding security for gas supplied, the customer tendered, and the company accepted, his demand note. The company thereafter demanded payment, and on the customer requesting delay, shut off the gas. In an action for damages, *held*, that as the security still existed, the refusal to supply was unauthorized: *Fowler v. Chartered Gas Co.*, 17 Gas J. 908; *Greenough*, 172.

§ 577. Duty of Gas Company—Liability for Negligence.

—A gas company is bound to exercise such care and skill in the manufacture and transmission of the gas as the nature of the business requires to prevent injury to others, and is liable for any negligence in omitting such duty whereby damage results.⁶ The making or distributing of illuminating gas not being a nuisance *per se*, negligence must be shown to render it responsible for an injury.⁷

¹ *Morey v. Met. Gas Co.*, 38 N. Y. Sup. Ct. 185.

² *Com. Bank v. London Gas Co.*, 20 U. C. Q. B. 233.

³ *Shepard v. Milwaukee Gas Co.*, 15 Wis. 318; 82 Am. Dec. 679. But see *Wright v. Colchester Gas Co.*, 30 Gas J. 336; *Greenough*, 155.

⁴ *Samuel v. Gas Co.*, 18 Gas J. 192; *Greenough*, 170.

⁵ *Halfhide v. Worthing Gas Co.*, 22 Gas J. 136; *Greenough*, 171. In such case the company will be enjoined until the rights of the parties are determined by the court: *Sickles v. Man-*

hattan Gas L. Co., 64 How. Pr. 33; 66 How. Pr. 304; *Penny v. Rossendale Gas Co.*, 14 Gas J. 927; *Greenough*, 173.

⁶ *Holly v. Boston etc. Co.*, 8 Gray, 123; 69 Am. Dec. 233; *Chisholm v. Atlanta Gas Light Co.*, 57 Ga. 28; *Emerson v. Lowell etc. Co.*, 3 Allen, 410; *Butcher v. Gas Co.*, 12 R. I. 149; 34 Am. Rep. 696; *Dillon v. Gas Co.*, 1 McAr. 626; *Oil City Gas Co. v. Robinson*, 99 Pa. St. 1.

⁷ *Strawbridge v. City of Philadelphia*, 13 Rep. 216 (Pa.); *Vickerman v. Gas Co.*, 15 Gas J. 654; *Greenough*, 125; *Allen v. Gas Co.*, L. R. 1 Ex. Div. 251.

Thus it is liable for injury resulting from the escape of gas from its pipes on account of defects in them;¹ or from failing to properly repair leaks, when notified that they exist;² or from negligently delaying making such repairs after notice;³ or in undermining a street in laying or repairing its pipes;⁴ or from imperfectly cutting off the supply of gas at a house;⁵ or making connections;⁶ or from not keeping up a proper inspection of their mains and pipes;⁷ or not keeping the meter supplied with water;⁸ or not properly laying its pipes;⁹ or from negligently causing obstructions in the streets in laying its pipes;¹⁰ or improperly filling up the openings in the street;¹¹ or for failing

¹ *Butcher v. Gas Co.*, 12 R. I. 149; 34 Am. Rep. 626; *Brown v. New York Gas Co.*, Anth. 351; *Parry v. Smith*, L. R. 4 Com. P. Div. 325; *Sherman v. Fall River Works Co.*, 2 Allen, 524; 79 Am. Dec. 799; *Sauvage v. Gas Co.*, 4 Gas J. 136; *Greenough*, 107; *Mersey Docks etc. Board v. Gas Co.*, 26 Gas J. 327; *Greenough*, 139; see *Flint v. Gas Co.*, 3 Allen, 343; 9 Allen, 552.

² *Brown v. Gas Co.*, Anth. 351; *Schemerhorn v. Metropolitan Gas Co.*, 5 Daly, 144; *Lannen v. Gas Co.*, 44 N. Y. 459; 46 Barb. 264; *Hann v. Gas Co.*, 18 Gas J. 186; *Greenough*, 112; *Burrows v. Gas Co.*, L. R. 5 Ex. 67; L. R. 7 Ex. 96; *Robinson v. Gas Co.*, 15 Gas J. 883; *Greenough*, 113; *Hunt v. Lowell etc. Gas Co.*, 3 Allen, 418; 8 Allen, 169; 85 Am. Dec. 697; *Oil City Gas Co. v. Robinson*, 99 Pa. St. 1; *Mose v. Hastings etc. Gas Co.*, 4 Fost. & F. 324; *Holly v. Boston Gas Co.*, 8 Gray, 123; 69 Am. Dec. 233; *Flint v. Gas Co.*, 9 Allen, 552; *Ellis v. Gas Co.*, 32 Gas J. 849; *Greenough*, 109; *Boothman v. Mayor*, 20 Gas J. 585; *Greenough*, 112.

³ *Brown v. New York Gas Co.*, Anth. 351. If the company has notice of the defect, it is immaterial whether it came to it through the plaintiff or not: *Hunt v. Gas Co.*, 3 Allen, 418; *Bartlett v. Gas Co.*, 122 Mass. 209.

⁴ *Devine v. Gas Light Co.*, 22 Hun, 26; 25 Id. 231.

⁵ *Lanigan v. New York Gas Co.*, 71 N. Y. 29; *Chisholm v. Gas Co.*, 57 Ga. 28.

⁶ *Cleveland v. Spier*, 16 Com. B., N. S., 399.

⁷ *Mose v. Gas Co.*, 4 Fost. & F. 324.

⁸ *Hacker v. London Gas Co.*, 32 Gas J. 781; *Greenough*, 781.

⁹ *Chadwick v. Corp. of Wigan*, 28 Gas J. 562; *Greenough*, 111; *Fare v. Gas Light Co.*, 25 Gas J. 566; *Greenough*, 111.

¹⁰ *Weld v. Gas Light Co.*, 1 Stark. 189; *Perrin v. Gas Co.*, 12 Gas J. 99; *Greenough*, 112; *Malling v. Gas Co.*, 12 Gas J. 99; *Greenough*, 112; *Ellis v. Sheffield Gas Co.*, 2 El. & B. 757. An iron box in a sidewalk, the top being higher than the walk, is a "defect in the highway," for which the city is liable under the Massachusetts statute: *Loan v. Boston*, 106 Mass. 450.

¹¹ *Dillon v. Wash. Gas Co.*, 1 McAr. 626. In *Weld v. Gas Light Co.*, 1 Stark. 189, the defendants, for the purpose of laying their pipes for conducting the gas, had made an excavation in the Strand of considerable length, and four feet in breadth. The rubbish which had been raised formed a mound on the side of the excavation, and between the mound and the opposite side of the street there was room for two carriages to pass. Between six and seven o'clock in the evening, in the month of January, the plaintiff was driving his gig through the Strand, and in avoiding a cart, the gig was precipitated into the trench, and the horse which drew it afterwards died, in consequence of the injury it received by the fall. Upon this case Lord

to close the service pipe when it cuts off the supply to a house;¹ or allowing poisonous and deleterious substances and noxious smells to escape from its works or mains,² thereby polluting the waters of a river;³ or private wells;⁴ or injuring vegetation;⁵ or fouling the air with smoke and bad smells.⁶ And an injunction will also be granted prohibiting the continuance of such nuisances.⁷ The burden of proof is on the plaintiff.⁸ Due care and vigilance on the part of the company is a question for the jury.⁹ Proof

Ellenborough said: "In point of law, I am clearly of opinion that where any company, such as the gas light company, is intrusted with the execution of a power, from which mischief may result to the community, they are bound to execute it as innocently as they can, even in the daytime; and in the night-time are bound to take especial precaution that no one shall receive injury. Here, the trench was left open at night; the defendants ought not to have allowed so large a portion to remain open; but if they did, it was their duty to have guarded it with especial care. There was no light set up for the purpose of warning the passenger of his danger, and the mound was not sufficient to prevent the mischief which ensued." The plaintiff had a verdict.

¹ *Lanigan v. New York etc. Gas Co.*, 71 N. Y. 29.

² *Carhart v. Auburn Gas Co.*, 22 Barb. 297; *Pottstown Gas Co. v. Murphy*, 39 Pa. St. 257; *Tilly v. Slough Gas Co.*, 17 Gas J. 231; *Greenough*, 130; *Columbus Gas Co. v. Freeland*, 12 Ohio St. 392.

³ *Carhart v. Auburn Gas Co.*, 22 Barb. 297; *Millington v. Griffiths*, 30 L. T., N. S., 65; *R. v. Modley*, 6 Car. & P. 292; *Manhattan Gas Co. v. Barker*, 7 Rob. (N. Y.) 523.

⁴ *Millington v. Griffiths*, 30 L. T., N. S., 65; *Brown v. Ilius*, 27 Conn. 84; 71 Am. Dec. 49; 25 Conn. 583; *Ottawa Gas Co. v. Thompson*, 39 Ill. 598; *Grange v. Gas Co.*, 14 Gas J. 309; *Greenough*, 134; *Sherman v. Fall River etc. Co.*, 5 Allen, 213; 2 Allen, 524; 79 Am. Dec. 790; *Shuter v. City*, 3 Phila. 228.

⁵ *Hendrie v. Lea Dist. Gas Co.*, 21 Gas J. 949; *Greenough*, 134; *Broadbent v. Gas Co.*, 7 H. L. Cas. 600; 7 De Gex, M. & G. 436.

⁶ *Pottstown Gas Co. v. Murphy*, 39 Pa. St. 257; *People v. Gas Co.*, 64 Barb. 55; 6 Lans. 467; *Carhart v. Auburn Gas Co.*, 22 Barb. 297; *Ottawa Gas Co. v. Thompson*, 39 Ill. 598; *Hunt v. Gas Co.*, 8 Allen, 169; 85 Am. Dec. 697; *Cleveland v. Citizens' Gas Co.*, 20 N. J. Eq. 201; *Wragg v. Gas Co.*, 33 Gas J. 119, 313; *Greenough*, 139; *Dorr v. Dansville Gas Light Co.*, 18 Hun, 274.

⁷ See cases in last four notes.

⁸ *Holly v. Boston Gas Co.*, 8 Gray, 123; 69 Am. Dec. 233.

⁹ *Butcher v. Providence Gas Co.*, 12 R. I. 149; 34 Am. Rep. 626; *Chisholm v. Atlanta Gas Co.*, 57 Ga. 28; *Mersey Docks etc. Board v. Gas Co.*, 26 Gas J. 327; *Greenough*, 109; *Ellis v. Gas Co.*, 32 Gas J. 849; *Greenough*, 109; *Cleveland v. Spier*, 16 Com. B., N. S., 399; *Blenkiron v. Gas Co.*, 2 Fost. & F. 437; *Farquharson v. Gas Co.*, 22 Gas J. 1085; *Greenough*, 111; *Chadwick v. Corp. of Wigan*, 23 Gas J. 562; *Greenough*, 111; *Boothman v. Mayor*, 20 Gas J. 585; *Greenough*, 112; *Hann v. Gas Co.*, 18 Gas J. 186; *Greenough*, 112; *Griffiths v. Gas Co.*, 16 Gas J. 139; *Greenough*, 125; *Perrin v. Gas Co.*, 12 Gas J. 99; *Greenough*, 112; *Malling v. Gas Co.*, 12 Gas J. 99; *Greenough*, 112; *Robinson v. Gas Co.*, 15 Gas J. 883; *Greenough*, 113; *Medex v. Gas Co.*, 15 Gas J. 75; *Greenough*, 125; *Ward v. Gas Co.*, 14 Gas J. 915; 15 Gas J. 45, 75; 16 Gas J. 10; *Greenough*, 126.

of the escape of gas makes a *prima facie* case of negligence.¹

It is no answer to a bill for an injunction against the nuisance that the company is required by its charter to manufacture gas of a certain quality, which cannot be done without creating such a nuisance as is complained of.² Nor is it any answer to an action for damages that the company is now conducting its works without injury to any one,³ or that the nuisance is unavoidable,⁴ or that it is authorized by the city to conduct its works in the manner it does.⁵ But where one action has been brought and judgment recovered for damage to real estate from gas works, this judgment is a bar to a second suit for the same cause, the continuance of the works being the sole basis of the second action.⁶ The company cannot defend an action for an injury caused by improperly laying its pipes in the street, or by negligence in so doing, on the ground that the work was done by an independent contractor.⁷ Where a vessel was stranded on a gas pipe on the bed of a river, it was held that the expense of getting her off was recoverable, but not delay in the owner's business, or other consequential damage.⁸ Where a servant in a club was permanently injured, it was held he could not recover an annuity equal to his salary for the rest of his life.⁹ Where the plaintiff's premises and well were injured from noxious smells from the gas works, it

¹ *Smith v. Boston Gas Co.*, 129 Mass. 318; *Fare v. Gas Co.*, 25 Gas J. 566; *Greenough*, 111.

² *Attorney-General v. Gas Light Co.*, L. R. 7 Ch. Div. 217.

³ *Watson v. Gas Co.*, 5 U. C. Q. B. 262.

⁴ *Watson v. Gas Co.*, 5 U. C. Q. B. 262.

⁵ *Terre Haute Gas Co. v. Teel*, 20 Ind. 131.

⁶ *Decatur Gas Co. v. Howell*, 92 Ill. 19.

⁷ *McCanus v. Citizen Gas Co.*, 40 Barb. 330; *Scott v. Mayor*, 37 Eng. L. & Eq. 495. But where the contractor

sublet the contract to a third party, it was held that the former was not liable: *Wray v. Evans*, 80 Pa. St. 102. A natural gas company is not liable for injuries resulting from the negligence of an independent contractor in the laying of its lines, unless it accepted work which it knew or ought to have known was so negligently done as to be unsafe and dangerous: *Chartiers Valley Gas Co. v. Lynch*, 118 Pa. St. 362.

⁸ *Benson v. Gas Light Co.*, 6 Allen, 149.

⁹ *Rapson v. Cubitt, Car. & M.* 64; 9 Mees. & W. 710.

was held that the cost of obtaining a good supply of pure water, and keeping the machinery in repair, and the depreciation of the value of the property, were recoverable.¹ A gas company is equally liable for an injury caused by escape of gas from the main pipe in a public street, and passing therefrom through various sewers and drains into the plaintiff's house, whether the injury was caused by inhaling gas of the defendants, or other gases from the sewers and drains which it set in motion, provided the plaintiff was not, and the defendants were, guilty of negligence. The defendant's negligence in such a case is as much the proximate cause of the injury as if their own gas had occasioned it.² In an action for damages to health by escaping gas, the plaintiff may show that other persons living in the house were taken sick, after the influx of the gas.³ But not the escape of gas or illnesses in other houses.⁴

ILLUSTRATIONS.—The servant of a gas company shut off the gas from a person's house in such a manner that the cellar filled with gas, and his wife, going into it, was injured by an explosion. *Held*, that the gas company was liable: *Louisville Gas Co. v. Gutenkuntz*, 82 Ky. 432. A gas company, for use in its business, affixed a telegraph wire, without his consent, to the chimney of A's house. The wire caused the chimney to fall, injuring B. *Held*, that A could recover the amount he paid to B as damages, from the company: *Gray v. Boston Gas Light Co.*, 114 Mass. 149; 19 Am. Rep. 324. A man was walking on a street, when a terrific explosion of gas occurred, through the negligence of the company's contractor. The man was not externally injured, but was much frightened, and afterwards went mad, raving about explosions. He subsequently died. *Held*, that his widow had a right of action against the company: *Fellwood v. Pearson*, 23 Gas J. 248. The authorities of a city sold to a contractor the whole dung and sweepings of the streets

¹ *Ottawa Gas Light Co. v. Graham*, 28 Ill. 73; 81 Am. Dec. 263.

² *Hunt v. Gas Light Co.*, 8 Allen, 169; 85 Am. Dec. 697.

³ *Hunt v. Gas Light Co.*, 1 Allen, 343. But the particulars of the illness are inadmissible: *Hunt v. Gas Light Co.*, 8 Allen, 169; 85 Am. Dec. 697.

⁴ *Emerson v. Lowell Gas Co.*, 3 Allen, 410; 6 Allen, 146; 83 Am. Dec. 621; *contra*, *Butcher v. Gas Co.*, 12 R. I. 149; 34 Am. Rep. 626. See *Ottawa Gas Co. v. Graham*, 35 Ill. 346; *Holly v. Gas Co.*, 8 Gray, 123; 69 Am. Dec. 233.

for a year. A gas company, opening the streets to lay its pipes, mixed sand and dirt with the sweepings, diminishing their value. *Held*, that the gas company was liable to the contractor: *Fisken v. City Gas Co.*, 12 Dunl. (Scotch) 757; 22 Jur. 262. The plaintiff was injured by jumping from a building, set on fire by an explosion of gas, after adjacent pipes of the gas company had been broken by the falling of heavy buildings in a great conflagration. *Held*, no evidence of negligence to make the company responsible: *Hutchinson v. Boston Gas Light Co.*, 122 Mass. 219. Gas escaped from the pipe placed there by the company to supply the plaintiff with gas, into his shop. The servant of a gas-fitter, employed in another room at the time, hearing of the escape of gas, went into the shop to find the cause, carrying a lighted candle, which caused an explosion, damaging the plaintiff's premises. The jury found that the escape was caused by a defect in the pipe, and that the servant of the gas-fitter was negligent in regard to the lighted candle. *Held*, that the company was liable: *Burrows v. March Gas Co.*, L. R. 5 Ex. 67; L. R. 7 Ex. 96.¹ A child under five sued a gas company, for injuries received by the inhalation of gas. The child

¹ In this case, Cockburn, C. J., in delivering the judgment of the court, said: "The action is not for negligence in its ordinary sense, but for the breach of a contract, whereby the defendants promised to supply the plaintiff with a proper and sufficient service pipe from their mains to a gas meter within his premises; and the question is, whether there has been a breach of this contract. There can be no doubt that there has been a breach. The contract was not to supply a pipe which might perhaps be defective until it was tested, but to supply a pipe reasonably sufficient for the purpose for which it was to be used. The defendants failed to do so. The pipe they supplied was defective, and the consequence—the natural and necessary consequence—was, that the gas escaped; and having so escaped, a further natural consequence was, that an accident might be expected to result. Now, what can the defendants allege in defense? As I understand their contention, it is, that because the explosion which actually happened was immediately caused by the gas-fitter, employed by the plaintiff to test the pipe, negligently using a lighted candle, whilst he was trying to discover whether the pipe was faulty

or not, they are exonerated. It is true, indeed, the jury found this man guilty of negligence; but his negligence was not the plaintiff's. Neither he nor Bates, his master, were in the plaintiff's employment, but were independent tradesmen. But where a person employs one man to furnish materials, and another to do work with these materials, I cannot think that, because the second man is guilty of negligence, the first is not to be liable if the materials supplied by him were not according to contract. But that is what the defendants must contend for, in this case. They appear to me to be liable upon another ground. They ought to have taken care, before laying gas on, that the apparatus of which this pipe was a part was safe and sufficient. They have thus been guilty of a double default,—first, in supplying a defective pipe; and secondly, in sending gas through it in quantities calculated to produce the catastrophe which occurred. The escape of gas was the direct consequence of their breach of contract, and was necessarily dangerous. The action is therefore maintainable, and the plaintiff is entitled to recover substantial damages."

and its mother occupied the same room and bed, and in the morning the mother was found to have been suffocated by escaping gas; the child lay by her side, insensible; the gas came from a crack in a pipe laid through the street; there was nothing tending to show that mother or child had notice of escaping gas, or could have got away, or let in the air; there was no smell of gas in the street the day before the accident. *Held*, that there was evidence to support a verdict for the plaintiff: *Smith v. Boston Gas Light Co.*, 129 Mass. 318.

§ 578. **Contributory Negligence.**—Contributory negligence of the plaintiff, as in other actions, will defeat his claim;¹ as, for example, where the tenant of the plaintiff, upon discovering the escape of gas in the house, neglected to notify the company, but recklessly brought a lighted candle in contact with it;² where the plaintiff, aware for some time that gas was escaping in his cellar, sent his servants there with a candle, which they lighted with a match;³ where gas escaped into a sewer, and the plaintiff—a civil engineer—entered the sewer with a light;⁴ where the plaintiff, a workman, had drawn the retorts by admitting atmospheric air until their contents exploded, he having been warned that this was dangerous, and should not be done;⁵ where the gas escaped from the main pipe in the street into the plaintiff's cellar, which had been excavated by him beyond the curb-line of the highway, contrary to a city ordinance;⁶ where the plaintiff discovered the leak in a pipe in his house, but failed to adopt suitable precautions against its hurtful effect, or to notify the company;⁷ where the plaintiff remained in the

¹ *Brown v. N. Y. Gas Co.*, Auth. 351; *Rapson v. Cubitt, Car. & M.* 64; 9 Mees. & W. 710; *Milwaukee Gas Co. v. The Gamecock*, 23 Wis. 144; 90 Am. Dec. 138; *Holly v. Gas Co.*, 8 Gray, 123; 69 Am. Dec. 233; *Smith v. Boston Gas Co.*, 129 Mass. 318; *Lannen v. Gas Co.*, 46 Barb. 264; 44 N. Y. 459; *Vickerman v. Gas Co.*, 15 Gas J. 654; *Greenough*, 125.

² *Bartlett v. Boston Gas Light Co.*, 117 Mass. 533; and see *Kimmell v. Burfeind*, 2 Daly, 155.

³ *Lanigan v. Gas Co.*, 71 N. Y. 29;

Vallee v. Gas Co., 7 Am. L. Rev. 767; *Hampton v. Gas Co.*, 14 Gas J. 606; *Greenough*, 117.

⁴ *Oil City Gas Co. v. Robinson*, 99 Pa. St. 1.

⁵ *Hulett v. Pudsey Gas Co.*, 28 Gas J. 663; *Greenough*, 116.

⁶ *Strawbridge v. Philadelphia*, 13 Rep. 216.

⁷ *Holly v. Boston Gas Light Co.*, 8 Gray, 123; 69 Am. Dec. 233; *Hunt v. Lowell Gas Light Co.*, 1 Allen, 343; *Parkin v. Gas Co.*, 26 Gas J. 946; *Greenough*, 120.

house after he discovered the escape of gas from a main in the street into it, and after he had a reasonable opportunity to procure another residence;¹ where the plaintiff, the landlord, the gas having been turned off, on the coming of a new tenant, and the gas being turned on by the company for him, did not see that the cocks inside the house were closed;² where the plaintiff delayed all day to notify the company of the leak;³ where a gas pipe under ground near a sewer had a defect in it, and the gas escaped into the sewer, and the city engineer in charge of the sewer knowing that there was a leakage, entered the sewer with a lighted lamp, when an explosion took place, and he was injured.⁴ But where a servant of a gas-fitter employed by the plaintiff on other work went into the room on hearing of the escape of gas, with a lighted candle;⁵ where the plaintiff, on hearing an extraordinary noise, went into the building at night with a light;⁶ where the leak was in a pipe put in by the plaintiff;⁷ where the company being sued for injury to the plaintiff's premises by noxious stench, coal-tar, etc., it appeared that the plaintiff produced other noxious odors in his own business;⁸ where servants of the city in building a sewer had injured the pipes,⁹—it was held that there was no bar. A saloon-keeper is not to be presumed to know that sewer-gas, when mixed in certain proportions with air, will explode, and therefore is not necessarily negligent in not making known the fact that the gas is escaping into his house.¹⁰

¹ *Hunt v. Lowell Gas Light Co.*, 1 Allen, 343. In *Holly v. Boston Gas Light Co.*, 8 Gray, 123, 69 Am. Dec. 233, this was held a question for the jury.

² *Holden v. Gas Co.*, 3 Com. B. 1; 3 M. G. & S. 1.

³ *Holly v. Boston Gas Light Co.*, 8 Gray, 123; 69 Am. Dec. 233; *Hills v. Gas Co.*, 13 Gas J. 877; *Greenough*, 129.

⁴ *Oil City Gas Co. v. Robinson*, 99 Pa. St. 1.

⁵ *Burrows v. Gas Co.*, L. R. 5 Ex. 41.

67; L. R. 7 Ex. 96; *Schermerhorn v. Gas Co.*, 5 Daly, 144. But see *Parkin v. Gas Co.*, 26 Gas J. 946; *Greenough*, 120.

⁶ *Sauvage v. Gas Co.*, 4 Gas J. 136; *Greenough*, 107.

⁷ *Lannen v. Gas Co.*, 46 Barb. 264; 44 N. Y. 459.

⁸ *Brown v. Illius*, 27 Conn. 84; 71 Am. Dec. 49.

⁹ *Butcher v. Providence Gas Co.*, 12 R. I. 149; 34 Am. Rep. 626.

¹⁰ *Kibele v. Philadelphia*, 105 Pa. St.

§ 579. **Right of Company to Sue, and Liability to be Sued.**—A gas company may sue for gas supplied to a person or corporation,¹ or for a breach of a contract to accept gas from year to year,² or for breach of a contract to supply it with coal.³ But gas is not a “necessary” for which a husband is liable if supplied to a wife living apart from him.⁴ In England it is held no defense to a suit for the price of gas supplied that the gas is of inferior quality.⁵ A city cannot refuse payment for gas supplied to it on the ground that the gas-works are a nuisance.⁶ In an English case, where the company sued for gas which it alleged the meter did not register because of defects in it, there was a verdict for the defendant.⁷ So where the meter showed a consumption of two thousand feet, but the defendant testified that he had used no gas, though he had not notified the company, it was held that though the statute made the meter *prima facie* evidence of the amount consumed, his testimony was conclusive.⁸ Where the meter was not inspected and stamped as required by law, it was held that the consumer was not bound by it.⁹ Where a company is limited to a certain charge for gas of a certain quality, if it supplies gas of a better quality it may charge proportionately more.¹⁰ But where by its charter the company is required to furnish a city a certain number of lights each year, and nothing is said as to payment, the company is not entitled to any compensation for such lights.¹¹

¹ City of London Gas Co. v. Nicholls, 2 Car. & P. 365; Hibernian Gas Co. v. Parry, 4 I. Law Rep. 453; London Gas Co. v. Vestry of Chelsea, 8 Com. B., N. S., 215.

² Church v. Gas Light Co., 6 Ad. & E. 846.

³ Equitable Gas Co. v. Jonassohn, 3 Gas J. 596; Greenough, 34.

⁴ Kettingen Gas Co. v. Leach, 24 Gas J. 503; Greenough, 104.

⁵ Great Central Gas Co. v. Tallis, 3 Gas J. 5; Torquay Gas Co. v. Carter, 32 Gas J. 490, cited in Greenough's Digest.

⁶ Davenport Gas Co. v. Davenport, 13 Iowa, 229.

⁷ Victoria Dock Gas Co. v. Burton, 16 Gas J. 103, cited in Greenough's Digest; and see Imperial Gas Co. v. Porter, 5 Gas J. 372; Greenough, 69.

⁸ Alliance and Dublin Gas Co. v. Taaffe, 27 Gas J. 206; Greenough, 65.

⁹ St. John Gas Co. v. Clarke, 1 Pug. & B. (N. B.) 307.

¹⁰ Great Cent. Gas Co. v. Clarke, 11 Com. B., N. S., 811; 13 Com. B., N. S., 838.

¹¹ Virginia City Gas Co. v. Mayor, 3 Nev. 320. Under an ordinance pro-

A surety signing the contract with the applicant for gas to be supplied to the principal at a certain house is not liable for gas supplied to the house after the principal has left it, but before notice thereof is given to the company.¹ It may sue for injury done to its pipes by a city contractor in constructing a sewer,² or by the servants of a city in running a steam-roller through the streets,³ or by a person who negligently injures its lamp-posts.⁴ But not for an injury to a pipe placed in the bed of a river by the anchor of a vessel in the river.⁵ A gas company may be sued for goods sold and delivered to it, though the contract is not under seal.⁶ It may be sued for a breach of its contract to deliver gas.⁷

viding that a gas company shall furnish the city with gas "of a quality at least equal to and at rates as favorable as that furnished" by a gas company in a neighboring city, the rates charged cannot at any time exceed those then charged by the latter company: *Decatur Gaslight and Coke Co. v. Decatur*, 24 Ill. App. 544.

¹ *Gas Co. v. Ely*, 39 Barb. 174.

² *In re Houghton*, 20 Hun. 395; *Phoenix Gas Co. v. Dethick*, 14 Gas J. 536; *Greenough*, 36.

³ *Pocock v. Brighton*, 31 Gas J. 429; *Greenough*, 96.

⁴ *Roche v. Milwaukee Gas Light Co.*, 5 Wis. 55.

⁵ *Milwaukee Gas Light Co. v. The Gamecock*, 23 Wis. 144; 99 Am. Dec. 138.

⁶ *Beverly v. Lincoln Gas Co.*, 6 Ad. & E. 829; and *Tilson v. Gas Co.*, 4 Barn. & C. 962.

⁷ *Hampton v. Oxford Gas Co.*, 3 Gas J. 64, cited in *Greenough*, 34.

PART V.—BUILDING AND LOAN ASSOCIATIONS.

CHAPTER XXXII.

BUILDING AND LOAN ASSOCIATIONS.

- § 580. Building and loan associations — In general.
- § 581. Powers of building associations.
- § 582. By-laws.
- § 583. Powers, duties, and liabilities of officers.
- § 584. Membership — How acquired — Rights and liabilities of members.
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- § 588. Security for the loan.
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- § 590. Application of dues, etc., to payment of mortgage.
- § 591. Foreclosure of mortgage — Ascertainment of amount due.
- § 592. Withdrawals.
- § 593. Dissolution and winding up.

§ 580. Building and Loan Associations — In General.
 —Building and loan associations or societies are formed under statutes existing in most of the states.¹ Their object is, "that any individual member may borrow money from the society to enable him to buy or build a house, mortgaging it to the society as security for the money borrowed, and ultimately making it absolutely his own, by paying off the mortgage out of his subscription."² A

¹ *Nelson v. Blakey*, 54 Ind. 29; *Mok v. Detroit Ass.*, 30 Mich. 511. Statutes authorizing the incorporation of loan associations are constitutional: *Freeman v. Ottawa Building etc. Ass.*, 114 Ill. 182; *Stein v. Indianapolis etc. Ass.*, 18 Ind. 237; 81 Am. Dec. 353.

² *Re Kent Building Ass.*, 1 Drew & S. 417. See Endlich on Building Associations, where the law of this subject is exhaustively treated. In a note to *Robertson v. Homestead Ass.*, 10 Md.

397, 69 Am. Dec. 151, the methods and objects of these associations are thus summed up: Their object is to aid those whose earnings are small in obtaining homes. This is done according to the scheme in general use in something like the following manner: A corporation or society is organized with a fixed number of shares having a certain paid-up value. Upon each share periodical sums, generally known as subscriptions or dues, are paid by

building society, organized under such statutes, must have for its leading object to carry on the business of erecting buildings for itself or others, and not to confine itself, as the primary and sole purpose of its organization, to the erection or improvement of a single building upon a single property of its own for its more convenient and lucrative development and use.¹ A representation in its circulars that it would be better and cheaper to borrow money of it than elsewhere is no ground for relief, though it proves untrue, where it appears that this is caused by the high premium bid by the complainants for the loans, and the fines incurred by them by failure to pay installments at maturity, and that otherwise the loan would have been at less than the usual rate of interest.²

§ 581. Powers of Building Associations.—The general rules as to the powers of corporations govern building and loan associations, subject to the particular language of their charters and the statutes of the state

the owner and member. These payments are to continue as long as the association is to exist, and the idea being to continue the same until each member can be paid a certain sum per share, fixed by the charter or articles. Generally, the period of existence is prescribed. Although a person may go on paying his subscriptions or dues simply, until the association terminates, when he receives a sum of money for each share that he owns, he may wish to anticipate this dividend and obtain an advance or loan from the association; and to make these advances or loans to its members is the primary purpose of the association. Whenever, therefore, it has a sum of money on hand equal to the full value of a share, the association is ready to make a loan, and this it does by putting the money up at auction, the members desiring a loan bidding the amount they are willing to give as a premium or bonus. Several of these sums of money may perhaps be thus put up at one time, and each bid in by the holder

of a sufficient corresponding number of shares. The premium or bonus is included in the obligation which the borrower gives, but is deducted from the total amount, and is retained by the association. This obligation is then secured by mortgage, and the stock is usually assigned to the association as collateral security. When the association is wound up, the stock is set off against the debt, which it equals. A member thus borrowing and keeping up his payments of interest, dues, and otherwise performing his obligation, becomes the owner of a piece of land. Some associations make the loans by redeeming or purchasing the shares of stock of members, that member who offers his shares at the lowest figure being the successful bidder. The payments made by the borrower, however, are the same in both cases.

¹ *People v. Troy House Co.*, 44 Barb. 625.

² *Winget v. Quincy Building etc. Ass'n*, Ill., 1889.

governing them. It is held, under certain statutes, that a building association has power to borrow money;¹ to invest its funds in real estate;² to take mortgages as security;³ to assign a mortgage in payment of or as security for a debt;⁴ to redeem its shares;⁵ to make a promissory note;⁶ to insure property taken as security;⁷ to compromise with a member, and release him from further obligation to the corporation, whether the indebtedness be for a loan or on subscription.⁸ But an association has no power to agree to sell a member shares in it beyond the number which, under the statute, a member may hold in his own right;⁹ or to refuse to loan its funds to its members; nor, by its rules or management, prevent the loan of its funds to a member who bids the highest premium therefor; nor to divide or distribute its funds among its members in advance of the distribution at the winding up of the corporation; nor to traffic in shares of its own stock.¹⁰

§ 582. By-laws.—Like other corporations, a building association has power to make by-laws.¹¹ But they must be reasonable,¹² and they cannot be retroactive as against

¹ *In re Victoria etc. Soc.*, L. R. 9 Eq. 605; Cal. Civil Code, sec. 640. In Pennsylvania and Ohio it has no power to borrow money to make loans: *Stiles's Appeal*, 95 Pa. St. 122; *State v. Oberlin B. & L. Ass'n*, 35 Ohio St. 258. In Maryland it may borrow money and execute a note for the purpose of paying an antecedent loan: *Davis v. West Saratoga B. Union*, 32 Md. 285.

² This is allowed in England: *Mullock v. Jenkins*, 14 Beav. 628. In Pennsylvania it cannot be done beyond the limit set by the statute: *Miller's Estate*, 2 Pearson, 348; *Rhoads v. Hoernerstown B. Ass'n*, 82 Pa. St. 180.

³ *Massey v. Association*, 22 Kan. 264.

⁴ *Quein v. Smith*, 108 Pa. St. 325.

⁵ By the redemption of its shares of stock it acquires the right of property therein; and the assignment of them to the association is not an hypotheca-

tion for a loan, but an absolute surrender, whereby they are sunk and extinguished: *Winchester Building Ass'n v. Gilbert*, 23 Gratt. 787.

⁶ *Davis v. West etc. Union*, 32 Md. 285.

⁷ *Chicago Building Society v. Crowell*, 65 Ill. 453.

⁸ *State v. Oberlin Building Ass'n*, 35 Ohio St. 258.

⁹ *Simpson v. Greenfield Building Ass'n*, 38 Ohio St. 349. That a member holds more than allowed by the by-laws of the association (but not in excess of the statutory limit) is no defense to a claim against him by the association on account of such shares: *Hagerman v. O. B. & L. Ass'n*, 25 Ohio St. 186.

¹⁰ *State v. O. B. & L. Ass'n*, 35 Ohio St. 258.

¹¹ *Martin v. Nashville B. Assoc.*, 2 Coldw. 418.

¹² See *ante*, Part I., Corporations in General.

existing contract rights.¹ A member having admitted and recognized the validity of the by-laws of an association is estopped to question the mode in which they were adopted,² and the payment of stated dues and fines cannot be resisted by a member on the ground that the by-laws have not been adopted by a vote of the directors, where it appears that they have been recorded, acted upon, and enforced as the by-laws of the association.³

§ 583. Powers, Duties, and Liabilities of Officers. — The powers, duties, and liabilities of officers of building associations are (except where enlarged or limited by the statutes or charters governing them) those which appertain to the officers of corporations generally.⁴ Managers are not personally liable for losses resulting from an honest mistake in estimating the value of stockholder's lands on which they loaned money, nor for a defect in the acknowledgment of a mortgage which rendered it worthless; but they are liable for losses from loans made on the personal security of stockholders, in violation of a by-law limiting the amount of such loans;⁵ and officers distributing the assets of the association on its expiration, among the stockholders shown by the books, are not liable to a bank to whom shares of stock have been assigned, and the certificate thereof delivered, when the stock was not transferred to the bank upon the books of the association, and no notice given to the association by the bank of the assignment.⁶ The monthly dues and fines of members of an association being payable in cash, the presence and acquiescence of the executive officers when promises to pay are given by members, or others for them, and accepted by the treasurer, will not discharge sureties on the treasurer's official bond from liability for credit thus given and

¹ In re Norwich Prov. Soc., L. R. 1 Ch. Div. 481.

² Morrison v. Dorsey, 48 Md. 461.

³ Hagerman v. B. & L. Assoc., 25 Ohio St. 186.

⁴ See *ante*, Part I., Corporations in General.

⁵ Citizens' B. Assoc. v. Coriell, 34 N. J. Eq. 383.

⁶ Bank of Com. Appeal, 73 Pa. St. 59.

loss.¹ The treasurer of a building society is only a bailee of moneys which he receives on account of the society, and does not become a debtor of the society, and consequently if he is robbed of the society's moneys he is discharged from liability to repay the amount of the robbery.² An officer of a building association, who knows that it is insolvent, cannot discharge his indebtedness to it with stock held by him.³ A statement by an officer of a loan association as to how many more payments would have to be made on a note given to secure the payment of a series of small sums for an indefinite time, being of necessity but a mere opinion, does not estop the association on an injunction to restrain the foreclosure of a trust deed given in security of the note.⁴

§ 584. Membership — How Acquired — Rights and Liabilities of Members.— Membership is acquired by the ownership of stock. One need not subscribe to the original articles of a building association in order to be a member. He may become a member after the articles are filed.⁵ Any person capable of contracting may be a member.⁶ The stock-book is *prima facie* evidence of membership.⁷ A person may be estopped from denying that he is a member of an association. Thus one who gives a bond and mortgage to an association, reciting in the bond that he is a member thereof, and recognizing the obligation of the by-laws, is estopped to deny that he is a member, in an action to foreclose the mortgage, from the fact that he never signed the by-laws as

¹ People's B. & L. Assoc. v. Wroth, 43 N. J. L. 70; Mutual B. & L. Assoc. v. Hammell, 43 N. J. L. 78.

² Walker v. Assoc., 18 Q. B. 277; 16 Jur. 885; 21 L. J. Q. B. 257.

³ Quein v. Smith, 108 Pa. St. 325.

⁴ Hammerslough v. Kansas City B. L. etc. Assoc., 79 Mo. 80.

⁵ Concordia Savings and Aid Ass'n v. Read, 93 N. Y. 474.

⁶ In some states, as in New Jersey,

infants and married women may be members. One association cannot, unless authorized by statute, be a member of another: North Am. Ass'n v. Sutton, 35 Pa. St. 463; 78 Am. Dec. 349; Dobinson v. Hawks, 16 Sim. 407.

⁷ Dobinson v. Hawks, 16 Sim. 407; Bank of Commerce's Appeal, 73 Pa. St. 59; German Union B. Ass'n v. Sendmeyer, 50 Pa. St. 67.

required;¹ and on general principles a person is estopped from denying membership for like reasons after he has acted for years as a member, claiming and enjoying all the privileges of such.² On the other hand, the association may also be estopped from denying that a person is a member. Thus the receipt of payments on account of installments due on the plaintiff's shares of stocks, after a recovery on a mortgage given by him, will estop the company from denying the existence of the stock,³ but this acceptance must be in such a manner as to bind the association.⁴ Where the constitution provides that on the death of a member his representatives or heirs may continue the membership, this is a privilege which the latter must exercise. The death dissolves the membership, and the heirs or representatives, if they elect, become members in their own right.⁵ A member after redeeming his stock cannot participate in subsequent profits.⁶ For refusing a transfer, *mandamus* will not lie against the association.⁷ The stockholders' remedy is a suit for damages,⁸ and he is entitled to recover the value of the stock at the time of the refusal or the amount paid by him as dues, with interest thereon from the time of the payments.⁹ The extent of the liability of a member of a building and loan corporation is his stock interest;¹⁰ and if he is himself a creditor of the corporation, he may set off his debt when sued by a creditor of the association to enforce his statutory liability.¹¹ A member who has

¹ Howard Mut. L. etc. Ass'n v. McIntyre, 3 Allen, 571.

² Parker v. U. S. B. etc. Ass'n, 19 W. Va. 744.

³ North Am. B. Ass'n v. Sutton, 35 Pa. St. 463; 78 Am. Dec. 349.

⁴ Card v. Carr, 1 C. B., N. S., 197; 26 L. J. C. P. 113.

⁵ Montgomery Ass'n v. Robinson, 69 Ala. 413; and see, as to the personal representatives of a deceased member, Kelsall v. Tyler, 11 Ex. 513; Knox v. Shepherd, 2 L. T., N. S., 351.

⁶ Overly v. Fayetteville B. & L. Ass'n, 81 N. C. 56.

⁷ State v. People's B. & L. Ass'n, 43 N. J. L. 379.

⁸ German Union B. Ass'n v. Sendmeyer, 50 Pa. St. 67; North Am. B. Ass'n v. Sutton, 35 Pa. St. 463; 78 Am. Dec. 349.

⁹ North Am. B. Ass'n v. Sutton, *supra*.

¹⁰ Sav. Ass'n v. Kellogg, 63 Mo. 540.

¹¹ Remington v. King, 11 Abb. Pr. 278.

voluntarily paid more money to obtain a release of his deed of trust than, under its constitution, the association could have required, cannot recover it back, if he knew all the facts when he made the payment, but was mistaken as to his legal rights.¹ Each member is liable for his share of the losses or expenses of the association.² A member does not escape this liability by transferring his stock without the consent of the association,³ or by withdrawing,⁴ or by becoming a borrower.⁵

ILLUSTRATIONS.—A, becoming a member of a building association, gave two mortgages to secure loans. The association, being authorized to require A to pay a bonus to place him on a footing with original members, required him to pay an amount equal to weekly dues of twenty-five cents per share from the time of organization to that of his subscription. *Held*, that this requirement was reasonable: *Home Mutual Building Ass'n v. Thursby*, 58 Md. 284. A purchased property upon which a building association held a deed of trust, he agreeing to pay off the debt due the association at the rate of forty dollars per month. *Held*, that he should not be treated as a member of the association, and half of his monthly payments credited to account of dues on stock: *Capitol Hill Building Ass'n v. Hilton*, 1 Mackey, 107. By the charter of the East Side Association of the city of New York, it is provided that shares of the "building stock" of the association, for which certificates shall be issued in the manner prescribed, shall, from the date thereof, be a lien and charge upon the real estate of the corporation. In an action to foreclose a mortgage given by the corporation upon certain of its real estate, defendant K., who held three thousand dollars of the building stock, claimed that it was a prior lien. It did not appear that any certificate for said stock had been issued as prescribed. *Held*, that, conceding that by payment of the subscription the subscriber for the stock became a stockholder, the lien did not necessarily flow from the relation of stockholder, but was a special statutory lien, and could only be enforced against *bona fide* lienors

¹ *Haigh v. United States B. etc. Ass'n*, 19 W. Va. 792.

² *McGrath v. Hamilton S. & L. Ass'n*, 44 Pa. St. 383.

³ *Everhart v. R. R. Co.*, 28 Pa. St. 339.

⁴ *McGrath v. Hamilton S. & L. Ass'n*, *supra*; *Wittman v. Concordia*

B. Ass'n, 13 Phila. 95; *Miller v. Jefferson B. Ass'n*, 50 Pa. St. 32.

⁵ *Pattison v. Albany B. & L. Ass'n*, 63 Ga. 373. Unless by becoming a borrower his membership is relinquished: *Bowker v. Mill River Ass'n*, 7 Allen, 100.

of the corporate property when perfected in the method and evidenced by the instrument prescribed by the act; and the mortgage being prior to the issue of any certificate upon the stock held by K., that it was the prior lien: *Rutter v. Kilpatrick*, 63 N. Y. 604

§ 585. **Payment of Dues.**—The member must pay his dues promptly, and is not entitled to notice of his being in arrear.¹ Where the constitution of a building association requires the payment of dues at regular stated meetings, the association is not bound by payments made at other times to the secretary, and embezzled by him.² The association may bring suit for the dues,³ and it is no excuse for non-payment that other members are also derelict.⁴ But the obligation to pay dues ends with the existence of the association, either by the terms of its charter⁵ or by its insolvency, and its going into the hands of a receiver.⁶ So, also, where the member withdraws and the stock is canceled.⁷ The borrower's bond or mortgage should, and generally does, provide for the payment of his dues, fines, etc., as well as the loan.⁸ In such case the payment of principal and interest does not extinguish the mortgage; it remains a valid security for dues, fines, etc.⁹

§ 586. **Fines and Forfeitures.**—The association has power to impose fines for the non-payment of dues at the stated periods.¹⁰ But fines must be reasonable;¹¹ and a fine of ten cents a share where the par value is one hundred and fifty dollars, and the dues twenty-five cents a

¹ *Morrison v. Dorsey*, 48 Md. 461.

² *Morrow v. James*, 4 Mackey, 59.

³ *Building Ass'n v. Krobs*, 7 Leg. & Ins. Rep. 21.

⁴ *Hoboken B. Ass'n v. Martin*, 13 N. J. Eq. 427.

⁵ *Burns v. Met. B. Ass'n*, 2 Mackey, 7; *Cook v. Kent*, 105 Mass. 246.

⁶ *Peter's B. Ass'n v. Jaacksch*, 51 Md. 198; *Low Street B. Ass'n v. Zucker*, 48 Md. 448.

⁷ *Miller v. Second Jefferson B. Ass'n*, 50 Pa. St. 32.

⁸ *Parker v. U. S. B. Ass'n*, 19 W.

Va. 769; *Hagerman v. Ohio B. & L. Ass'n*, 25 Ohio St. 186; *Pfeister v. Wheeling B. Ass'n*, 19 W. Va. 676; *Juniata B. & L. Ass'n v. Morell*, 84 Pa. St. 313.

⁹ *Everham v. Oriental Ass'n*, 47 Pa. St. 352; *Farmer v. Smith*, 4 Hurl. & N. 196.

¹⁰ *Hagerman v. Ohio B. & L. Ass'n*, 25 Ohio St. 186.

¹¹ *McGannon v. Central B. Ass'n*, 19 W. Va. 726; *Hagerman v. B. & L. Ass'n*, 25 Ohio St. 186.

week, is reasonable,¹ so fines at the rate of a shilling per pound per month are reasonable.² A second fine for non-payment of the same dues cannot be imposed;³ so, although fines for non-payment of dues may be authorized, they cannot without special mention be imposed for default in payment of interest on loans;⁴ and under the code of West Virginia, an association has no right to impose such a fine.⁵ Interest is likewise not chargeable upon fines.⁶ A transfer fee for each share transferred is reasonable.⁷ A by-law that "any stockholder who neglects or refuses to pay his weekly dues as often as the same shall be payable shall forfeit and pay the additional sum of ten cents for every share of stock by him held for every such weekly neglect or refusal, etc.," authorizes the imposition of one fine only for failure to pay the dues accruing during any particular week. An additional fine of ten cents per share for every week such dues remain unpaid cannot be collected.⁸ So a by-law is void in so far as it provides that every stockholder delinquent in the payment of his monthly dues and interest "shall forfeit and pay the additional sum of ten cents monthly on each and every dollar due by him,"⁹ and a borrower paying such a fine is entitled to a credit therefor on his debt. Fines are usually treated as liquidated damages.¹⁰ A fine will

¹ *McGannon v. B. Ass'n*, 19 W. Va. 726.

² *Parker v. Butcher*, L. R. 3 Eq. 762; 16 L. J. Ch. 552.

³ *McGannon v. B. Ass'n*, *supra*; *Hagerman v. B. & L. Ass'n*, *supra*; *Monumental etc. Society v. Lewin*, 38 Md. 445; *Forest City etc. B. Ass'n v. Gallagher*, 25 Ohio St. 208.

⁴ *Hagerman v. Ohio B. & L. Society*, *supra*; *Forest City B. Ass'n v. Gallagher*, *supra*; *Shannon v. B. Ass'n*, 36 Md. 383; *Occidental B. & L. Ass'n v. Sullivan*, 62 Cal. 394.

⁵ *Parker v. U. S. B. Ass'n*, 19 W. Va. 744.

⁶ *Ingoldby v. Riley*, 28 L. T., N. S., 55.

⁷ *McGannon v. B. Ass'n*, 19 W. Va. 726.

⁸ *Shannon v. Howard Ass'n*, 36 Md. 383; *Monumental etc. Society v. Lewin*, 38 Md. 445.

⁹ *Lynn v. B. Ass'n*, 117 Pa. St. 1; 2 Am. St. Rep. 639.

¹⁰ *Parker v. Butcher*, L. R. 3 Eq. 762; *Provident Permanent B. Ass'n v. Greenhill*, L. R. 9 Ch. Div. 122; *Shannon v. Howard Mut. B. Ass'n*, 36 Md. 383; *Ocmulgee B. & L. Ass'n v. Thomson*, 52 Ga. 427. But in some cases they have been looked on as penalties, which (if unreasonable) will be relieved against in equity: *Occidental B. & L. Ass'n v. Sullivan*, 62 Cal. 394; *Mulloy v. Fifth Ward B. Ass'n*, 2 McArthur, 594.

run, not only to the filing of a bill to foreclose the mortgage, but to the time of the decree.¹ A rule of an association forfeiting shares of members for non-payment of subscriptions is not unreasonable.² But where stock is under the charter, or by laws forfeitable, it will not be deemed as having been forfeited until action to that effect has been taken by the corporation.³ A forfeiture may consequently be waived,⁴ and its enforcement is at the option of the directors of the association.⁵ When stock is forfeited, a forfeiture of membership necessarily takes place, and the obligation to pay dues ends.⁶ An association has no power to retire or cancel any part of the stock of a member against his will and without any default on his part, if no power is reserved so to do in the articles of incorporation.⁷ A member is not estopped by paying an illegal fine under a threat that otherwise his mortgage will be foreclosed and his stock forfeited, but may have the amount so paid credited on his mortgage.⁸

§ 587. Loans—How and to Whom Made.—In building associations loans are made by putting up the money at auction among the members, the bidder of the highest premium having the right of precedence.⁹ The association has no right to fix a minimum rate of premium below which they will accept no bid.¹⁰ When the association

¹ *Union B. Ass'n v. Masonic Hall Ass'n*, 29 N. J. Eq. 389.

² *Card v. Carr*, 1 Com. B., N. S., 197; 26 L. J. C. P. 113.

³ *Watkins v. B. & L. Ass'n*, 97 Pa. St. 514.

⁴ *North Am. B. Ass'n v. Sutton*, 35 Pa. St. 463; 78 Am. Dec. 349.

⁵ *Moore v. Rawlins*, 6 Com. B., N. S., 289.

⁶ *McCahan v. B. Ass'n*, 40 Md. 226.

⁷ *Bergman v. B. Ass'n*, 29 Minn. 275.

⁸ *Lynn v. B. & L. Ass'n*, 117 Pa. St. 1; 2 Am. St. Rep. 639.

⁹ *State v. Greenville B. & L. Ass'n*, 29 Ohio St. 92; *State v. Oberlin B. & L. Ass'n*, 35 Ohio St. 258.

¹⁰ *In Stiles's Appeal*, 95 Pa. St. 122,

the supreme court say: "It would be a gross perversion of the whole spirit and design of such an association . . . to fix a minimum rate of premium below which they will accept no bid. They are bound to offer all that is in the treasury to open competition, so that the members may obtain the loan at a low premium if there should be no bid at a higher. The practical operation of such institutions is, that wherever the member procures a loan at a premium below the average of the premiums for the whole time the association has to run, he is to that extent a gainer; where his loan is at a premium higher than the average, he is to that extent a loser. This is a most valuable fea-

has funds, it cannot refuse to loan them to its members in good standing.¹ And when the object of an association is stated to be for "the accumulation of a fund, by small monthly installments, to enable members of the association to purchase real estate, erect buildings, redeem mortgages, satisfy ground-rent, loan money, pay taxes, and effect other similar purposes," the power is conferred to loan money from such accumulated fund to its members.² The lending of money to share-holders on mortgages, on such terms and conditions as may be prescribed by the by-laws, being one of the express powers conferred on building and loan associations by the code, such a loan is not *ultra vires* although in contravention of the by-laws.³ The primary object of building and loan associations being to aid members in securing homes by making advances or loans to them, the authority to make loans to strangers seems to be generally denied;⁴ but it is held that a borrower who was a stranger is estopped to plead the *ultra vires* transaction,⁵ and the association may recover from a borrower not a member the amount loaned, and interest.⁶ In Pennsylvania it was held that no duty is imposed upon them to inquire for what purpose loans are being obtained, or to require any stipulation from a borrower as to the use he shall make of the money, or in any manner to

ture in such associations, and hence the great importance of maintaining the principle of free competition in the bids. Where the member is told that there is a minimum premium below which loans will not be made, he must offer that amount for the loan, whether any other one offers or not. If no one offer to that amount is made, the money remains in the treasury without investment. It is evident in this way that the members who are not borrowers will obtain a very undue advantage over the members who are borrowers. These institutions are liable, like everything else human, to abuse, and we are bound to guard them carefully from being perverted

into mere contrivances by which capitalists can evade the laws against usury."

¹ State v. B. & L. Ass'n, 35 Ohio St. 258; Bergman v. Ass'n, 29 Minn. 282.

² Massey v. B. Ass'n, 22 Kan. 624.

³ Kelly v. Mobile etc. Ass'n, 64 Ala. 501.

⁴ Wolbach v. Ass'n, 84 Pa. St. 211; State v. B. & L. Ass'n, 35 Ohio St. 258; Pocock v. B. Ass'n, 71 Ind. 357; St. Joseph B. Ass'n v. Thompson, 19 Kan. 321; Mechanics' etc. B. Ass'n v. Agency Co., 24 Conn. 159.

⁵ Pocock v. B. Ass'n, 71 Ind. 357.

⁶ Wolbach v. B. Ass'n, 84 Pa. St. 211; St. Joseph B. Ass'n v. Thompson, 19 Kan. 321.

supervise or control its disbursement;¹ and in Ohio, also, building corporations are not required to ascertain the use to which a borrowing member intends to apply the money, the statute contemplating loans to be used "in buying lots or houses, or in building or repairing houses, or other purposes";² but in West Virginia, under the law as to homestead and building associations, it is their duty to see that money paid to their members on loans advanced is used by such members in buying lots or houses, or in building or repairing houses.³ When a statute provides that associations, at the end of each year, "shall make a rebate of interest on the amount of dues paid on loans awarded," the legislative intent is to lessen interest paid on such loans, and does not permit a rule providing that an annual settlement should be had with each borrower, when he should receive a rebate of interest on the amount of dues paid and earnings credited for the expiring year, but that on sums so credited he should receive no further dividends.⁴

ILLUSTRATIONS.—A obtained three loans from a building association, giving for each a bond and a mortgage upon the same land, and transferring, for collateral security, his stock in the association, a certain number of shares for each loan. Afterwards B obtained a judgment against A, and issued an attachment execution thereon. The association then sold the land under its third mortgage, subject to the first two mortgages, and became the purchaser. B contended that the bonds and mortgages held by the association were thus extinguished and satisfied, and that the stock should revert to A. *Held*, that the intention of the parties manifestly having been that the stock should not revert to A before actual payment of the loans, the purchase should not be deemed to have that effect: *Germania Building Assoc. v. Neill*, 93 Pa. St. 322.

§ 588. Security for the Loan.—Building and loan associations will not be compelled specifically to perform

¹ *Juniata B. & L. Ass'n v. Mixell*, 84 Pa. St. 313; *Johnston v. B. & L. Ass'n*, 14 Week. Not. Cas. 247.

² *Pfeister v. B. Ass'n*, 19 W. Va. 676.

³ *Hagerman v. B. & L. Ass'n*, 25 Ohio St. 186.

⁴ *Seibel v. Victoria B. Ass'n*, 43 Ohio St. 371.

an obligation to lend to a member who has bid off the loan at auction, when the solicitor of the association believes the title offered as security to be defective.¹ They have power to loan money on the same security as individuals, notwithstanding their usual mode is to require the borrowers to assign their own stock as collateral to his mortgage;² and where an association is authorized to loan money, but its charter does not expressly authorize it to take a mortgage or other security, it will nevertheless have power by implication to take a mortgage.³ So where the by-laws of an association provide that borrowers from it shall secure the repayment of said loan with legal interest by satisfactory bond or mortgage upon real estate, the officers of the association have power to take both securities.⁴ The mortgage or deed of trust of a third person may also be taken by an association to secure a loan to a member,⁵ including interest, fines, dues, and other charges;⁶ and in such a case the association is under no obligation to notify the third person of the default of the member in paying interest, fines, dues, etc.⁷ It is competent also for a married woman to unite with her husband in executing a valid mortgage on her separate property to secure a loan to her husband, and to cover premiums, fines, etc.⁸ Where, however, the member also assigns to the association stock therein as additional security, the third person has the right when sued for the debt to have such stock first sold to satisfy the debt.⁹ And if third persons give a deed of trust to secure a loan to a member, their responsibility as sureties is not to be extended by implication or construction, but the measure of their liability is to be found in the instrument which

¹ Conklin v. People's B. & L. Ass'n, 41 N. J. Eq. 20.

² Union B. Ass'n v. Ass'n, 29 N. J. Eq. 389.

³ Massey v. B. Ass'n, 22 Kan. 624.

⁴ Juniata B. Ass'n v. Hetzel, 103 Pa. St. 507; 14 Week. Not. Cas. 431.

⁵ Massey v. Ass'n, 22 Kan. 624; Re-

lief etc. Ass'n v. Longshore, 8 Luz. Leg. Reg. 199; Pfister v. Ass'n, 19 W. Va. 676.

⁶ Pfister v. Ass'n, 19 W. Va. 676.

⁷ Id.

⁸ Juniata B. & L. Ass'n v. Mixell, 84 Pa. St. 313.

⁹ Massey v. Ass'n, 22 Kan. 624.

creates it.¹ Where stock is pledged and a mortgage given for the same debt, the mortgagor has the right to insist, as against his assignee in bankruptcy and an assignee of the mortgage, that the stock be first sold to reduce the amount of the mortgage lien, and of the mortgagor's personal liability.² A provision in a mortgage to secure an advance that in case of failure to pay the prescribed contributions, interest, dues, or fines, for a time specified, the whole sum advanced, together with all dues and fines owing by the mortgagor, shall be deemed due and may be collected, is lawful, and may be enforced, and a court of equity will not relieve against the consequences;³ and where the mortgage contains a provision that in case of default the association might sell under the statute, and invest the overplus, if any, and draw for and apply it from time to time as required to the payment of all accruing dues, fines, etc., until the determination of the association, the association is entitled, on judgment of foreclosure, to have a provision inserted directing the surplus to be invested accordingly.⁴ But a provision in a mortgage given to secure monthly installments, that if default should be made "in the said monthly payments for the space of six months after they or any of them should become due," it should be lawful for the association to advertise and sell the mortgaged premises at public auction, according to statute, precludes the association from suing to foreclose the mortgage within the six months, as well as from proceeding under the statute.⁵ The mortgage debts due to a building association, by the members thereof, are only a source of revenue to the association, and do not, until default made, constitute assets to be applied in satisfaction of the claims of the unredeemed

¹ *Forsyth v. Ass'n*, 1 Mackey, 205.

⁴ *Franklin B. Ass'n v. Mather*, 4

² *Wittenbrock v. Bellmer*, 62 Cal. 560.

Abb. Pr. 274.

³ *Concordia Sav. etc. Ass'n v. Read*, 93 N. Y. 474.

⁵ *Second Am. B. Ass'n v. Blatt*, 5 Duer, 675.

share-holders.¹ Where a note and mortgage were executed by a member to a building association in 1874, it was held that they were not affected by amendments adopted in 1876 to its constitution, namely, one requiring no dues thereafter from unpledged shares, and another changing the manner in which withdrawn shares were to be paid off, and instructing the directors to close the business.²

ILLUSTRATIONS. — A *feme sole* held stock in a building association, in the name of a trustee, paying the monthly dues by an agent, who meanwhile borrowed money from the association to the full value of the shares, gave a mortgage therefor, and at length had his mortgage satisfied by giving up the stock, though it still stood in the name of her trustee untransferred. On a bill in equity filed by her to secure the value of the stock, *held*, that the association was liable therefor: *Larkin's Appeal*, 38 Pa. St. 457. A applied to a building association for a loan, and offered as security therefor mortgages on certain properties which he owned. B, the solicitor of the association, on the representation of A that he could obtain the searches more quickly from the recorder of deeds, allowed A to procure the searches. A induced the clerk of the recorder to issue the searches, omitting one mortgage on each of the properties, assuring the clerk that these mortgages should be satisfied. A sale took place on the omitted mortgages, and the association lost its money. *Held*, 1. That the recorder was liable for the loss; 2. That A was in no sense the agent of the association, so as to affect it with his knowledge of the encumbrances; 3. That the authority given to A by the solicitor was not within the scope of his powers, and would not bind the association: *Peabody B. etc. Ass'n v. Houseman*, 89 Pa. St. 261; 33 Am. Rep. 757.

§ 589. **Premiums — Usury.** — Contracts made by building associations in violation of the laws restricting interest are held to be subject to the penalties of usury, irrespective of the terms or forms employed.³ But a mort-

¹ *Lister v. Log Cabin etc. Ass'n*, 38 Md. 115.

² *Hekelnkaemper v. Ass'n*, 22 Kan. 549.

³ *Jackson v. Cassidy*, 68 Tex. 282; *Mills v. Salisbury etc. Ass.*, 75 N. C. 292; *Houser v. Hermann Build. Ass.*, 41 Pa. St. 478; and see *Gordon v.*

Winchester Build. etc. Ass., 12 Bush, 110; 23 Am. Rep. 713; *Baltimore etc. Build. Ass. v. Taylor*, 41 Md. 409; *State v. Greenville Build. etc. Ass'n*, 29 Ohio St. 92; *Canada etc. Ass'n v. Rowell*, 19 U. C. Q. B. 124; *Citizens' etc. Ass'n v. Uhler*, 48 Md. 455; *Mulloy v. Build. Ass'n*, 2 McAr. 594.

gage given to a building society by a holder of its stock is not usurious because monthly payments of interest are required, besides fines and impositions in accordance with the provisions of the constitution of the society.¹ The taking of premiums is generally considered unobjectionable.² In Georgia it is held that whether the contract of a borrowing member is in fact usurious depends upon the object of the association, being illegal if a mere device to evade the usury laws, but otherwise not; and this was a question of fact for the jury.³ In a few states, premiums in excess of lawful interest are not allowed.⁴ In a number of the states, charging interest on premiums is not usurious, and is now expressly authorized in some states, as in Alabama and Pennsylvania.⁵ In some states, again, where premiums themselves may be taken, charging

¹ *Red Bank Mut. etc. Ass'n v. Patterson*, 27 N. J. Eq. 223; and compare *Forest City etc. Ass'n v. Gallagher*, 25 Ohio St. 208; *City Build. etc. Co. v. Fatty*, 1 Abb. App. 347; *Williar v. Baltimore etc. Ass'n*, 45 Md. 546; *Morrison v. Glover*, 4 Ex. 430; *Provident etc. Build. Soc. v. Greenhill*, L. R. 9 Ch. Div. 122; 25 Eng. R. 824.

² *Montgomery B. & L. Ass'n v. Robinson*, 69 Ala. 413; *West Winsted Ass'n v. Ford*, 27 Conn. 282; 71 Am. Dec. 66; *West Winsted Ass'n v. Rice*, 27 Conn. 293; *People's B. Ass'n v. Collins*, 27 Conn. 145; *Pabst v. Ass'n*, 1 McAr. 385; *Mulloy v. Ass'n*, 1 McAr. 594; *McLaughlin v. Ass'n*, 62 Ind. 264; *Shaffrey v. Ass'n*, 64 Ind. 600; *Hawkeye B. & L. Ass'n v. Blackburn*, 48 Iowa, 385; *Burlington etc. Ass'n v. Heider*, 55 Iowa, 424; *Massey v. Ass'n*, 22 Kan. 624; *Salina etc. Ass'n v. Nelson*, 22 Kan. 751; *Shannon v. Ass'n*, 36 Md. 383; *Merrill v. McIntyre*, 13 Gray, 157; *Barker v. Bigelow*, 15 Gray, 130; *Delano v. Wild*, 6 Allen, 1; 83 Am. Dec. 605; *Bowker v. Ass'n*, 7 Allen, 100; *Hammer-slough v. Ass'n*, 79 Mo. 80; *Shannon v. Dunn*, 43 N. H. 194; *Franklin B. Ass'n v. Marsh*, 29 N. J. L. 225; *Hoboken B. Ass'n v. Martin*, 13 N. J. Eq. 427; *Somerset County etc. Ass'n v. Camman*, 11 N. J. Eq. 382; *Clarks-*

ville B. & L. Ass'n v. Stephens, 26 N. J. Eq. 351; *Red Bank Ass'n v. Patterson*, 27 N. J. Eq. 223; *Citizens' etc. Ass'n v. Webster*, 25 Barb. 263; *City B. & L. Co. v. Fatty*, 1 Abb. App. 347; *Concordia etc. Ass'n v. Read*, 93 N. Y. 474; *White v. Mechanics' Ass'n*, 22 Gratt. 223; *Winchester etc. Ass'n v. Gilbert*, 23 Gratt. 787.

³ *Parker v. Ass'n*, 46 Ga. 166; 42 Ga. 451; *Redwine v. Ass'n*, 54 Ga. 474; *Bibb County Ass'n v. Richards*, 21 Ga. 592; *Shannon v. Dunn*, 43 N. H. 194.

⁴ *Gordon v. Ass'n*, 12 Bush, 110; *Herbert v. Ass'n*, 11 Bush, 296; *Lincoln etc. Ass'n v. Graham*, 7 Neb. 173; *Lincoln etc. Ass'n v. Benjamin*, 7 Neb. 181; *Mills v. Ass'n*, 75 N. C. 292; *Vann v. Ass'n*, 75 N. C. 494; *Latham v. Ass'n*, 77 N. C. 145; *Hanner v. Ass'n*, 78 N. C. 188; *Hoskins v. Ass'n*, 84 N. C. 838; *Columbia etc. Ass'n v. Bollinger*, 12 Rich. Eq. 124; 78 Am. Dec. 463; *Mechanics' etc. Ass'n v. Dorsey*, 15 S. C. 462; *Martin v. Ass'n*, 2 Coldw. 418; *Pfeister v. Ass'n*, 19 W. Va. 676.

⁵ *Montgomery etc. Ass'n v. Robinson*, 69 Ala. 413; *Selden v. Ass'n*, 81 Pa. St. 336; 2 Week. Not. Cas. 481; *Building Ass'n v. Neurath*, 2 Id. 95; *Johnston v. Ass'n*, 14 Id. 247; *Mobile etc. Ass'n v. Robertson*, 65 Ala. 382.

interest thereon is illegal.¹ If the association fails to see that money lent to a member is applied in buying lots or houses, or in building or repairing houses, it forfeits its privilege of exemption from the usury law applicable to loans generally, an advance of money to a member under the act being a loan; but it may enforce the payment of the principal and legal interest, but nothing more, although stipulated for, except reasonable fines for non-payment of dues.² It has been held in Illinois that the section of the statute of that state incorporating building associations, which provides that "no premiums, fines, or interest on such premiums that may accrue to the said corporation according to the provisions of this act shall be deemed usurious, and the same may be collected as other debts of like amount may be collected by law in this state," is in violation of two of the clauses of the constitution of Illinois; namely, that prohibiting the regulating of interest on money, and that prohibiting the granting to any corporation, association, or any individual any special or exclusive privilege, immunity, or franchise by special or local law.³

ILLUSTRATIONS. — A building association made a loan to one of its members, at a premium of twenty-eight per cent, which was secured by a bond and mortgage for the nominal amount of the loan, and a transfer of the borrower's shares of stock as collateral security. The borrower being desirous of paying off the loan before the mortgage became due, the association settled with him by taking his stock at the amount paid on it, deducting ten per cent from the nominal amount of the loan, and receiving the balance in cash. *Held*, that the amount paid beyond the sum actually loaned, with legal interest, might be recovered back by the borrower: *Philanthropic etc. Ass'n v. McKnight*, 35 Pa. St. 470. A holder of stock in an associa-

¹ *Hawkeye Ass'n v. Blackburn*, 48 Iowa, 385; *Burlington Ass'n v. Heider*, 55 Iowa, 424; *Forest City etc. Ass'n v. Gallagher*, 25 Ohio St. 208; *Risk v. Ass'n*, 31 Ohio St. 517; *Oak Cottage Ass'n v. Eastman*, 31 Md. 561; *Baltimore etc. Soc. v. Taylor*, 41 Md. 409; *Williar v. Ass'n*, 45 Md. 546; *Bir-*

mingham v. Ass'n, 45 Md. 541; *Citizens' etc. Co. v. Uhler*, 48 Md. 458; *Geiger v. Ass'n*, 58 Md. 569.

² *Pfeister v. Wheeling Building Ass'n*, 19 W. Va. 676.

³ *Monticello Build'g Ass'n v. Smythe*, 10 Cent. L. J. 434.

tion on which nothing had been paid, gave his note for a loan equal to the amount of the stock, agreeing to pay monthly interest at ten per cent on the full amount of the loan, and an installment of one dollar on each share. He never received the full amount of the loan, though it was always ready for him, and his payments went into the common fund, in which he was entitled to share ratably on dissolution of the association. *Held*, that there was no usury: *Hammerslough v. Loan Ass'n*, 79 Mo. 80.

§ 590. **Loans — Application of Dues, etc., to Payment of Mortgage.**— When a member of an association becomes a borrower, the transaction has been considered as so much in the nature of a loan that subsequent payments made by the member upon his stock are partial payments upon his debt,¹ and therefore every such payment is a *pro tanto* extinguishment of his debt;² but other cases, proceeding upon the theory that a borrower still continues a member, maintain that payment of dues are not payments of the mortgage debt, and do not *ipso facto* work a *pro tanto* extinguishment,³ but the borrower has, notwithstanding, a right so to apply them, and the association having a lien upon his shares may, in case of default, make a like application,⁴ and his assignee for

¹ *Overby v. Ass'n*, 81 N. C. 56; *Hoskins v. Ass'n*, 84 N. C. 838.

² *Kupfert v. Ass'n*, 30 Pa. St. 465; *Hughes's Appeal*, 30 Pa. St. 471; *Philanthropic B. Ass'n v. McKnight*, 35 Pa. St. 470; *Building Ass'n v. Timmins*, 3 Phila. 209.

³ *North Am. B. Ass'n v. Sutton*, 35 Pa. St. 463; 78 Am. Dec. 349; *Spring Garden Ass'n v. Loan Ass'n*, 46 Pa. St. 493; *Selden v. Ass'n*, 81½ Pa. St. 336; 2 Week. Not. Cas. 481; *Lidk v. Ass'n*, 89 Pa. St. 15; *Early's Appeal*, 89 Pa. St. 411; *Economy B. Ass'n v. Hungerbuehler*, 93 Pa. St. 258; *Germania Ass'n v. Neill*, 93 Pa. St. 322; *Watkins v. Ass'n*, 97 Pa. St. 514; 10 Week. Not. Cas. 414; *Building Ass'n v. Eshelbach*, 7 Phila. 189; *Building Ass'n v. Wall*, 7 Phila. 240; *Weiss's Appeal*, 5 Week. Not. Cas. 423; *Kreamer v. Ass'n*, 6 Week. Not.

Cas. 267; *Kingsessing Ass'n v. Roan*, 9 Week. Not. Cas. 15; *Barker v. Bigelow*, 15 Gray, 130; *Delano v. Wild*, 6 Allen, 1; 83 Am. Dec. 605; *Mechanics' Ass'n v. Conover*, 14 N. J. Eq. 219; *Hoboken Ass'n v. Martin*, 13 N. J. Eq. 427; *Somerset County Ass'n v. Camman*, 11 N. J. Eq. 382; *Washington etc. Ass'n v. Hornbacker*, 42 N. J. L. 635; *Hekelnkaemper v. Ass'n*, 22 Kan. 549; and it is immaterial that officers of the association considered the payments as such in law: *Economy B. Ass'n v. Hungerbuehler*, 93 Pa. St. 258.

⁴ *Spring Garden Ass'n v. Ass'n*, 46 Pa. St. 493; *Early's Appeal*, 89 Pa. St. 411; *North Am. Ass'n v. Sutton*, 35 Pa. St. 463; 78 Am. Dec. 349; *Watkins v. Ass'n*, 97 Pa. St. 514; *Economy Ass'n v. Hungerbuehler*, 93 Pa. St. 258.

the benefit of creditors may also apply the payments,¹ but not a sheriff's vendee of the mortgagor.² A member who has assigned his shares of stock to a third person as collateral security for a debt cannot, when sued upon his mortgage to the association, claim a credit for the value of such shares,³ and where a member assigned all his shares as collateral security upon obtaining a loan from an association, and on obtaining a second loan on other shares made a second assignment of all his stock, he cannot afterwards apply the installments paid upon the stock to the first loan, which had been secured by judgment, if before obtaining the second he had made no such appropriation.⁴ Where in an action by a building association against a member for an amount borrowed by him from it, for which it holds his shares therein as collateral, he, having defaulted in the payment of both premiums and interest on his loan, seeks to apply the value of his stock on account of his indebtedness, he will be entitled to credit only for the amount paid in by him on account of the said stock, and not to its value at the time of the trial.⁵ Where a borrowing member is in default, a sale should be for the amount of cash necessary to pay expenses and the amount due, and the credits should so be arranged as to make the payments meet and discharge the sums to become due on their accrual.⁶

§ 591. Foreclosure of Mortgage—Ascertainment of Amount Due.—“Where a borrowing member wishes to withdraw, or is in default, and his mortgage is sought to be enforced, an important question is the ascertaining of the amount presently due upon his mortgage, which he is justly liable to pay. It must be remembered that when

¹ Spring Garden Ass'n v. Ass'n, 46 Pa. St. 493.

² Springville etc. Ass'n v. Raber, 11 Phila. 546.

³ Schober v. Association, 35 Pa. St. 223.

⁴ Philadelphia Mercantile Ass'n v. Moore, 47 Pa. St. 233.

⁵ Watkins v. Workingmen's B. etc. Ass'n, 97 Pa. St. 514.

⁶ Fox v. Cottage Building Fund Ass'n, 81 Va. 677.

a member obtains a loan or advance, he anticipates the amount he is to receive upon the termination of the association or of the series to which he belongs. His obligation does not look to a repayment before that time. If he desires to withdraw, or it becomes necessary to enforce his mortgage against him, before that period arrives, the question is, What amount ought he equitably to pay? In ascertaining this amount, the only difference between the two cases seems to be, that when he voluntarily withdraws he is entitled to receive the bonus or share of profits allowed him under the laws of the associations, and when he is in default no such allowance is to be made him. Bearing this difference in mind, the rule as established by the English decisions is, to estimate the probable or possible duration of the society, to then calculate the aggregate amount of subscriptions and redemption money for that period, and to charge the member as a present debt with that amount, in addition to all arrearages and fines, deducting redemption money paid in."¹ In America the same rule substantially has been applied, except that from the aggregate amount of the interest and dues a just amount of interest is rebated.² Where an association is

¹ Note to *Robertson v. Homestead Ass'n*, 69 Am. Dec. 163; *Fleming v. Self*, 3 De Gex, M. & G. 997; 1 Jur., N. S., 25; 24 L. J. Ch. 29; 3 Week. Rep. 89; *Smith v. Pilkington*, 1 De Gex, F. & J. 120; 4 Jur., N. S., 58; 29 L. Ch. 227; 30 L. T. 196; *Mosley v. Baker*, 6 Hare, 87; 12 Jur. 551; 17 L. J. Ch. 257; *Seagrave v. Pope*, 1 De Gex, M. & G. 783; 15 Eng. L. & Eq. 477; *Archer v. Harrison*, 7 De Gex, M. & G. 404; 3 Jur., N. S., 194; 29 L. T. 71; *Matteson v. Eldersfield*, L. R. 4 Ch. 207; 20 L. T. 503; 17 Week. Rep. 422; *Farmer v. Smith*, 4 Hurl. & N. 196; 5 Jur., N. S., 533; 28 L. J. Ex. 226; *Sparrow v. Farmer*, 26 Beav. 511; 5 Jur., N. S., 530; 28 L. J. Ch. 537; 33 L. T. 216; *Handley v. Farmer*, 29 Beav. 362.

² *Shannon v. Howard* etc. Ass'n, 36 Md. 383; *Lister v. Ass'n*, 38 Md. 115; *McCahan v. Ass'n*, 40 Md. 226; *Hen-*

nighausen v. Tischer, 50 Md. 583; *Border State Ass'n v. McCarthy*, 57 Md. 555; *Cincinnati etc. Ass'n v. Flach*, 1 Cin. Rep. 468; *Hagerman v. Ass'n*, 25 Ohio St. 186; *Risk v. Ass'n*, 31 Ohio St. 517; *Knell v. Ass'n*, 34 Md. 72; *Low Street Ass'n v. Zucker*, 48 Md. 452; *Home etc. Ass'n v. Thursby*, 58 Md. 288; *Oak Cottage Ass'n v. Eastman*, 31 Md. 559. For other statements of the rule as to ascertaining the amount due, see *Mechanics' etc. Ass'n v. Conover*, 14 N. J. Eq. 219; *Montgomery etc. Ass'n v. Robinson*, 69 Ala. 413; *Ocmulgee etc. Ass'n v. Thomson*, 52 Ga. 427; *Pattison v. Ass'n*, 63 Ga. 373; *Overby v. Ass'n*, 81 N. C. 56; *Hoskins v. Ass'n*, 84 N. C. 838; *Hekelnkaemper v. Ass'n*, 22 Kan. 549; *Glynn v. Ass'n*, 22 Kan. 746; *Licking County Ass'n v. Bebout's Admr*, 29 Ohio St. 252.

prematurely dissolved, and the mortgages of members are foreclosed, in determining the amount due under such mortgages, the mortgagors should be allowed not only for the sums paid by them as dues, but also for what they paid as interest, while they are to be charged interest on the sums advanced by the association, and so from time to time on the balance of such sums after deducting therefrom the moneys paid by them for dues and interest.¹

As between an association and a second mortgagee of the premises, stock held by the association as collateral security will be first applied to the payment of the amount due on the mortgage to the association before recourse is had to the mortgaged premises;² and this equity of the second mortgage will not be defeated by a levy on the stock, under a judgment against the mortgagor.³ Where a person executed a mortgage on two lots to an association, and assigned to it as collateral security five shares of the stock, and afterwards gave the complainant a mortgage on one of the lots, and then assigned his interest in the stock to third persons, the complainant may require the association to sell first the lot which was exclusively embraced in its mortgage, but cannot compel the appropriation of the stock to the payment of the first mortgage.⁴ A member who receives a loan from an association, and executes a mortgage as security, cannot, in proceedings to enforce the mortgage, deny the legal existence of the association,⁵ and a purchaser of the equity of redemption is equally estopped.⁶

¹ *Windsor v. Bandel*, 40 Md. 172; *Low Street Ass'n v. Zucker*, 48 Md. 448; *Hampstead etc. Ass'n v. King*, 58 Md. 279.

² *Herbert v. Ass'n*, 17 N. J. Eq. 497; *Red Bank etc. Ass'n v. Patterson*, 27 N. J. Eq. 223; *Phillipsburg Ass'n v. Hawk*, 27 N. J. Eq. 355.

³ *Herbert v. Ass'n*, 17 N. J. Eq. 497; *Phillipsburg Ass'n v. Hawk*, 27 N. J. Eq. 355.

⁴ *Reilly v. Mayer*, 12 N. J. Eq. 55.

⁵ *Cahall v. Ass'n*, 61 Ala. 232; *West Winsted etc. Ass'n v. Ford*, 27 Conn.

282; 71 Am. Dec. 66; *West Winsted etc. Ass'n v. Rice*, 27 Conn. 293; *McLaughlin v. Ass'n*, 62 Ind. 264; *Jones v. Ass'n*, 77 Ind. 340; *Massey v. Ass'n*, 22 Kan. 624; *Lord v. Ass'n*, 37 Md. 320; *Lincoln etc. Ass'n v. Graham*, 7 Neb. 173; *Mechanics' etc. Ass'n v. Stevens*, 5 Duer. 676; *Lucas v. Ass'n*, 22 Ohio St. 339; *Hagerman v. Ass'n*, 25 Ohio St. 186; *Becket v. Ass'n*, 88 Pa. St. 211; *Johnston v. Ass'n*, 14 Week. Not. Cas. 247.

⁶ *People's etc. Ass'n v. Collins*, 27 Conn. 142.

Where a stockholder borrows on mortgage, and dies before default, and the mortgaged estate is sold under an order of the orphans' court to pay debts, the mortgage is to be considered as voluntarily paid, and the amount due is to be adjusted upon this supposition, and not as though a recovery had been had by suit.¹ Where a share-holder has assigned his stock to such association as security for a loan, and the loan is also secured by a judgment, upon a sale of his real estate by the sheriff he may elect to have the value of the stock deducted from the amount of the judgment, before the latter is permitted to share in the proceeds of the sale. Where a share-holder has so elected, an attachment of the stock thereafter binds only the interest which remains after the stock has been applied to the payment of the judgment.² Where a member who had mortgaged his shares to the association to secure a loan took no steps to contest the validity of a sale of the shares for non-payment of taxes, he cannot, five years afterwards, charge the association with liability.³

ILLUSTRATIONS.—A's wife and others executed a mortgage upon their real estate to enable him to borrow money from a building association, of which he was a member, the power of sale in which provided that the proceeds, upon the sale of the mortgaged property, should go to satisfy the sum borrowed, "after deducting therefrom the value of the said stock." *Held*, that a sale under the power would be enjoined upon A's offer to pay the sum remaining after making that deduction, although, as between A and the association, he was not entitled to have such deduction made: *Forsyth v. Hibernia Building Ass'n*, 1 Mackey, 205.

§ 592. **Withdrawals.**—A member is usually by the charter or constitution of a building and loan association permitted to withdraw at any time, and take out the money paid in with interest, less a proportionate share of the ex-

¹ *Snider's Estate*, 13 Phila. 560.

² *Early's Appeal*, 89 Pa. St. 411.

³ *McNeal v. Mechanics' B. & L. Ass'n*, 40 N. J. Eq. 351.

penses or losses as the case may be, and all fines or charges assessed against him. The association may also permit him to take a proportion of the profits up to that time, but not his complete share at the time of the withdrawal, for the intent of such associations is to divide the profits at the winding up of the concern, and not as each member wishes to retire.¹ A building association may authorize its borrowing members to withdraw and be released from further liability upon the payment of dues, interest, and fines up to a specified time, and may afterwards resolve that such permission shall remain open only until a certain date. Borrowing members who fail to avail themselves of their opportunity before the date so determined cannot do so afterwards.² Notice of withdrawal, if required, must be given.³ A member is not bound by new rules made after he has given notice of withdrawal.⁴ Where it is provided that a stockholder wishing to withdraw shall have power to do so by giving notice of intention, when he shall be entitled to receive the amount paid in by him, and such proportion of the profits as the by-laws may determine, less all fines and other charges, a proviso that at no time shall more than one half the funds in the treasury be applied to the demands of withdrawing stockholders does not estop a withdrawing member from legal process for the recovery of the money until the treasury has funds sufficient to meet his claim.⁵

Under a statute providing that "no stockholder shall be entitled to withdraw whose stock is held in pledge for security," a stockholder who had borrowed from the corporation, and pledged his stock as security, could not withdraw until he had redeemed his stock by payment of

¹ "If a share-holder wishes to participate in all the profits of the association, he must wait until the corporation winds up the series to which he belongs": *O'Rourke v. West Pa. Ass'n*, 93 Pa. St. 308.

² *Booz's Appeal*, 109 Pa. St. 592.

³ *Hartford v. Co-operative etc. Co.*, 128 Mass. 494.

⁴ *Armitage v. Walker*, 2 Kay & J. 211.

⁵ *U. S. B. & L. Ass'n v. Silverman*, 85 Pa. St. 394; *Nat. etc. Ass'n v. Hubley*, 34 Leg. Int. 6.

the loan, or an unconditional tender.¹ A withdrawing stockholder must bear his proportion of losses sustained prior to notice of withdrawal.² A board of trustees or directors who are to pass upon the grounds of withdrawal given by a member have no right to withhold their consent arbitrarily;³ and if a by-law provides that any person wishing to withdraw, "and who shall have been a member of the association two years, and be clear of the books," shall receive a certain per cent on the amount paid by him into the funds of the association, such member may withdraw without leave of the directors.⁴ A stockholder who is a borrower, and whose stock is held by the association in pledge, is not entitled to withdraw, nor to any of the rights of a withdrawing member, until he redeems his stock;⁵ but a member is entitled to withdraw on paying up any balance due by him on a settlement of his account, where the constitution of an association provides that no stockholder shall be permitted to withdraw who has received any portion of his stock in advance until the same has been fully repaid;⁶ and a member who complies with the constitution and by-laws of an association, and under their provisions withdraws, can recover the amount due him by *assumpsit*.⁷

ILLUSTRATIONS.—The rules of a building society provided that investing members should be allowed to withdraw their money upon giving notice, "provided the funds permit," and also that no "further liabilities shall be incurred by the society till such member has been repaid." The society was ordered to be wound-up, when it appeared that the assets were sufficient to pay the outside creditors, but not sufficient to pay the investing members in full. *Held*, that the rules applied to the relations of the members *inter se*, notwithstanding

¹ Anderson etc. Ass'n v. Thompson, 88 Ind. 405.

² Wittman v. Concordia B. Ass'n, 13 Phila. 95.

³ Wetterwulph v. B. Ass'n, 2 Bosw. 381.

⁴ Fuller v. Salem etc. Ass'n, 10 Gray, 94.

⁵ Anderson B. Ass'n v. Thompson, 88 Ind. 405.

⁶ Pabst v. B. Ass'n, 1 McAr. 385.

⁷ Haigh v. B. Ass'n, 19 W. Va. 792.

the winding up, and that investing members who had given notices of withdrawal before the commencement of the winding up, but had not been repaid, were entitled to be paid in priority to those who had given no notices of withdrawal: *Walton v. Edge*, 25 L. T., N. S., 666. A stockholder in a building association, under resolution of the society permitting borrowers to withdraw, on the payment of a stipulated amount, the stock to be then "withdrawn and canceled," withdrew, and his loans and stock, which was then marked on the books as "canceled," and "withdrawn," were paid off. *Held*, that the association could not subsequently recover for back dues which had accrued on such stock: *Miller v. Second Jefferson Building Ass'n*, 50 Pa. St. 32. A by-law of a co-operative building association provided that "if any member wishes to withdraw from the company, he shall give notice in writing to the clerk of such intention, when the company shall, within one year from the receipt of such notice, pay to said member the sum of money which he has paid as installments, and the one hundred dollars which he originally paid for stock, which certificate of stock he shall deliver to the treasurer." Another by-law provided that "if any member willfully neglects his payments, he shall, after one year, take what money he has paid to the company as installments and for stock, the certificate of which stock he shall surrender to the treasurer." *Held*, that a member who had not given notice of his intention to withdraw until within less than a year before bringing a suit could not maintain an action against the association for the amount of stock and installments paid by him: *Hartford v. Co-operative Homestead Co.*, 128 Mass. 494.

§ 593. Dissolution and Winding up.—A court of equity has jurisdiction at the suit of share-holders of unredeemed shares in a building association to call the redeemed share-holders to account, enforce payment of what they respectively owe, distribute the fund among the unredeemed share-holders, and wind up the concern;¹ and where suit is brought to wind up the affairs of such an association, all the share-holders should be made parties, and if any have been illegally released, their liabilities should be enforced.² Where by common consent of the stockholders

¹ *Edelin v. Pascoe*, 22 Gratt. 826.

² *Cason v. Seldner*, 77 Va. 293.

a building and loan association was to be wound up, it is not competent for a majority of the stockholders to adopt a scheme of settlement, but the parties are left to the relations which equity establishes.¹ Where an association has become insolvent in winding up its affairs, after deducting expenses incident to the administration of its assets, the general creditors, if any, should be first paid in full, and the residue of the fund should be distributed *pro rata* among those whose claims are based upon the stock of the association, whether they have withdrawn and hold orders for the withdrawal or not.² And where an association is authorized by charter to receive money on deposit from stockholders, to bear interest at a certain rate in case of insolvency, such stockholders are creditors of the association as to their deposits, and in payment of them are entitled to a *pro rata* share of the assets of the association with other outside creditors, in preference to the stockholders.³

Where it is practically dissolved, suspending business and resolving to close its affairs, members are not bound to make further payments on loans under the original agreements, but are entitled to have the mortgages given by them released on payment of what is justly due on an accounting.⁴ If the constitution provides that it shall proceed to close when the unsold stock is worth fifty per cent premium, it cannot, after that time has come, defer closing for a further advance in the value of its real estate, and meanwhile compel stockholders to keep paying dues.⁵ In a suit to wind up the affairs of a building association, the sum advanced a share-holder is no part of his

¹ City etc. Ass'n v. Goodrich, 48 Ga. 445. As to the liability of the officers carrying out such scheme, see 54 Ga. 98.

² Christian's Appeal, 102 Pa. St. 184.

³ Criswell's Appeal, 100 Pa. St. 488; 12 Week. Not. Cas. 489.

⁴ Waverly Mut. etc. Building Ass'n v. Buck, 64 Md. 338. And see Strohn v. Franklin etc. Ass'n, 115 Pa. St. 273.

⁵ Burns v. Metropolitan Building Ass'n, 2 Mackey, 7.

debt. His obligation is to pay, in lieu of the sum advanced, the monthly installments due under his contract, and no more.¹ Where by the articles of a building association it is to continue in operation eight years, unless it shall sooner have sufficient funds to pay its debts and redeem its stock, a resolution before the expiration of either of these contingencies dissolving it is void.²

¹ *Cason v. Seldner*, 77 Va. 293.

Ass'n, 114 Ind. 226; 5 Am. St. Rep.

² *Barton v. Enterprise Loan etc.* 606.

PART VI.—VOLUNTARY ASSOCIATIONS.

CHAPTER XXXIII.

VOLUNTARY ASSOCIATIONS.

- § 594. Voluntary associations — Status of in general.
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§ 594. **Voluntary Associations — Status of in General.** — Voluntary unincorporated associations are regarded in the law as, and are treated as, partnerships, both as between the members thereof and as regards third persons.¹ But like corporations, they are permitted to regulate the conduct of their officers according to by-laws adopted by them, and to admit and expel members, and are subject to the control of the courts in these respects.² What is known as a “board of brokers” is not strictly a corporation or a partnership, or a joint-stock company. It is a voluntary association. The members, for convenience in the transaction of business with each other, associate themselves to provide a common place for the transaction of

¹ *Moore v. Brink*, 4 Hun, 402; 571; *Bullard v. Kinney*, 10 Cal. 60. *Lafond v. Deems*, 1 Abb. N. C. 318; See also *post*, Title III, Partnership — Joint-stock Companies.
Butterfield v. Beardsley, 23 Mich. 412; *Tyrrell v. Washburn*, 6 Allen, 466; ² *Leech v. Harris*, 2 Brewst. 571.
Babb v. Reed, 5 Rawle, 151; 28 Am. See *ante*, Title Corporations — Expulsion of Members.
 Dec. 650; *Leech v. Harris*, 2 Brewst.

their individual business; agreeing among themselves to pay the expenses of the objects of the association, whereby each for himself, and for his individual profit, may prosecute his own business, and enter into separate engagements with his fellow-members.¹ For workmen belonging to a particular craft to form an association from which employers and foremen are excluded, for the purpose of protecting themselves against their employers, and to agree, in furtherance of such object, not to teach others their trade unless by consent of the society, is not unlawful.² The organization by legal incorporation of persons who have subscribed to a common fund for a common purpose, when regularly accomplished by the common consent of the associates, constitutes the corporation, the true and only organization to which subscriptions are to be paid, and the proper and legal party to demand and enforce their payment.³ The title to property may be vested in an association before it is incorporated, and no formal transfer is necessary, after incorporation, to vest such title in the corporation.⁴

§ 595. Powers and Liabilities of Association.—The majority of the members at a properly called meeting may appropriate its funds to any purpose within the scope of the objects of the association,⁵ but not to one foreign to such objects.⁶ A voluntary association may make a valid lease,⁷ but may not hold real estate.⁸ But a deed of land to a voluntary unincorporated association not empowered to take and hold land, but the members of which are ascertainable, may be construed as a grant to such members as tenants in common.⁹ An association

¹ *Leech v. Harris*, 2 Brewst. 571.

² *Snow v. Wheeler*, 113 Mass. 179.

³ *Edinboro' Academy v. Robinson*, 37 Pa. St. 210; 78 Am. Dec. 421.

⁴ *American Silk Works v. Salomon*, 6 Thomp. & C. 352; 4 Hun, 135.

⁵ *Abels v. McKeen*, 18 N. J. Eq. 462.

⁶ *Abels v. McKeen*, 18 N. J. Eq.

462; *Morton v. Smith*, 5 Bush, 467.

⁷ *Reding v. Anderson*, 72 Iowa, 498.

⁸ *Liggett v. Ladd*, 17 Or. 89; *East Haddam etc. Baptist Church v. East Haddam Baptist etc. Soc.*, 44 Conn. 259.

⁹ *Byam v. Bickford*, 140 Mass. 31.

of workmen not formed for an illegal purpose can maintain an action to recover money belonging to them, although in attempting to carry out the lawful purpose of the association they have been guilty of illegal acts.¹ And in an action by an association against its treasurer to recover the funds of the society, the defendant cannot set up in defense thereto the unlawful purpose and object of the society.² An unincorporated voluntary association cannot sue in a corporate capacity, but, being deemed a partnership, suit may be brought in the name of the partners, or in the name of one or more for the use of all.³ A part of the members of a voluntary association cannot bind the others without their consent, previously given, or a subsequent ratification,⁴ except in cases where the act done is so clearly in furtherance of the object for which the association was organized that consent or ratification may be presumed.⁵ Land may be conveyed to a trustee in trust for stockholders and their heirs in an unincorporated company.⁶ An agricultural society has no authority to employ hackmen to convey persons to and from its grounds.⁷ It has been held that voluntary unincorporated associations have not legal capacity to take property by will, even for purposes denominated "charitable."⁸ Other cases, however, hold that a bequest or devise to such an association may be valid,⁹ or at least

¹ *Snow v. Wheeler*, 113 Mass. 179.

² *Willson v. Owen*, 30 Mich. 474.

³ *Pipe v. Bateman*, 1 Iowa, 360; *Mears v. Moulton*, 30 Md. 142; *Gorman v. Russell*, 14 Cal. 531; *Wood v. Draper*, 24 Barb. 187; *Birmingham v. Gallagher*, 112 Mass. 190. A society that cannot be incorporated because organized to resist the enforcement of laws cannot sue in its society name for the collection of a debt: *Detroit Schnetzen Bund v. Detroit Agitations Verein*, 44 Mich. 313.

⁴ *Sizer v. Daniels*, 66 Barb. 426.

⁵ *Sizer v. Daniels*, 66 Barb. 426.

⁶ *Natchez v. Minor*, 9 Smedes & M. 544; 48 Am. Dec. 727.

⁷ *Bathe v. Decatur etc. Agric. Soc.*, 73 Iowa, 11.

⁸ *White v. Howard*, 46 N. Y. 144; *Leonard v. Davenport*, 58 How. Pr. 384; *Sherwood v. Am. Bib. Soc.*, 4 Abb. App. 227; *McKeon v. Kearney*, 57 How. Pr. 349; *Grescle v. Bimeler*, 5 McLean, 223.

⁹ *Estate of Ticknor*, 13 Mich. 44; *Swasey v. Am. Bib. Soc.*, 57 Me. 523; *Preachers' Aid Soc. v. Rich*, 45 Me. 552; *Hamblett v. Bennett*, 6 Allen, 140; *Evangelical Association's Appeal*, 35 Pa. St. 315; *Burr v. Smith*, 7 Vt. 276; 29 Am. Dec. 154; *Smith v. Nelson*, 18 Vt. 511; *Cahill v. Bigger*, 8 B. Mon. 211; *Cory Universalist Soc.*

made to take effect indirectly.¹ Voluntary associations may prescribe by-laws, rules, and regulations for the government of their members, which, if reasonable, are binding.² But all rules of discipline of voluntary associations must conform to the laws of the land.³

§ 596. Officers — Powers and Duties of.—The officers of an incorporated association are trustees for the association, and subject to the rules already discussed.⁴ The trustees of a voluntary benevolent association, whose funds are raised by voluntary contribution of its members, may maintain a suit upon a note, although the makers thereof were members of the association.⁵ An action is maintainable in the individual names of trustees or their survivors, where a note is payable to the "trustees or their successors" of an unincorporated company, the word "trustees" being a designation of persons, and the phrase "their successors" may be rejected as surplusage.⁶ Directors of an unincorporated association have no implied power to draw bills on it.⁷ A voluntary association

v. Beatty, 28 N. J. Eq. 570; but compare *Owens v. Missionary Soc.*, 14 N. Y. 330; 67 Am. Dec. 160; *White v. Howard*, 46 N. Y. 144; *Goeale v. Bimler*, 5 McLean, 223; *Sherwood v. Am. Bib. Soc.*, 4 Abb. App. 227; *State v. Warren*, 28 Mo. 338.

¹ *Gibson v. McCall*, 1 Rich. 174; *Preachers' Aid Soc. v. Rich*, 45 Me. 552; *Cory Univ. Soc. v. Beatty*, 28 N. J. Eq. 570; *Swasey v. Am. Bible Soc.*, 57 Me. 523.

² See *Title Corporations, ante*; or they may amend such by-laws already made: *Fugure v. Mut. Soc.*, 46 Vt. 362. In *Dillard v. Patton*, 18 Cent. L. J. 309, *Hammond, J.*, said: "Nor can it be denied that merchants may voluntarily associate together and prescribe for themselves regulations to establish, define, and control the usages or customs that shall prevail in their dealings with each other. These are useful institutions, and the courts recognize their validity and enforce their

rules whenever parties deal under them, in which case the regulations become, undoubtedly, a part of the contract: *Thorne v. Prentiss*, 83 Ill. 99; *Goddard v. Merchants' Exchange*, 9 Mo. App. 290. But they have not, any more than other customs and usages, the force and effect of positive statutes, nor of the rules of the common law, and the courts do not particularly favor them: *The Reesesside*, 2 Sum. 568; *The Illinois*, 2 Flip. 422. Parties are not bound to contract under them if they choose to disregard them, and they may, and often do, observe part and discard part."

³ *State v. Williams*, 75 N. C. 134.

⁴ See sections *ante*, as to directors of corporations: *In re Fry*, 4 Phila. 129.

⁵ *Pierce v. Robie*, 39 Ma. 206; 63 Am. Dec. 614.

⁶ *Davis v. Garr*, 6 N. Y. 124; 55 Am. Dec. 387.

⁷ *Dickinson v. Valpy*, 5 Man. & R. 126.

cannot confer judicial powers on its officers or committees.¹ The rule of a society, "that no officer be permitted to occupy his chair while under charges," should not be construed in its broadest sense, so as to exclude the officer from the performance of all the duties of his office, but rather in its literal meaning, to prevent him from occupying his chair at meetings.²

ILLUSTRATIONS.—The president and other members of an unincorporated company purchased and paid for property for the company, without authority. *Held*, that a ratification by managers of the company, who had no authority to borrow money or increase the capital, was not sufficient to bind the members: *Crum's Appeal*, 66 Pa. St. 474. A bought lands with the money of an association consisting of himself and seven others. He conveyed the land to the association, which, however, being unincorporated, could not take. He and his associates always treated the conveyance as valid, and B received a deed from the seven members of the association. A's heir sued B in ejectment. *Held*, that B had a good equitable defense as to seven eighths of the land: *Douthitt v. Stinson*, 73 Mo. 199. The commanding officer of a company in a militia regiment received money from the state with which to pay the rent of the armory occupied by the company, and expended it for the benefit of the company in another way. *Held*, that the company was liable to the lessor for money had and received for the money so received by the commanding officer: *Fox v. Naramore*, 36 Conn. 376.

§ 597. **Liabilities of.**—The agent of a voluntary association, not disclosing the fact of his agency, is personally bound on contracts made by him.³ Committees appointed by a voluntary association to make arrangements for a public exhibition were held individually liable for work necessary for the occasion, which a subcommittee of their number procured to be done, although in making the contract the subcommittee assumed to act as officers of the association.⁴ The trustees or com-

¹ *Austin v. Searing*, 16 N. Y. 112; 69 Am. Dec. 665.

² *Potter v. Search*, 7 Phila. 443.

³ *Hutchinson v. Wheeler*, 3 Allen, 577.

⁴ *Fredendall v. Taylor*, 23 Wis. 538; 99 Am. Dec. 203; *McCartee v. Chambers*, 6 Wend. 649; 22 Am. Dec. 556.

mittee of an association cannot, however, be held individually liable for its debts, unless they have in some way specially incurred individual liability;¹ as by giving their note for a debt.² The makers of a promissory note who describe themselves in a body of the instrument as trustees of an unincorporated association, but who sign the same in their individual capacity, are personally bound thereby.³ A written contract for the lease of a hall, between the owner and the chief officer of an unincorporated association acting for the latter, is binding upon both parties; and though the association is incapable of owning any interest in real estate, yet the officer and his associates who assent are personally bound by the lease.⁴ Where an association was formed for the purpose of paying to its members, out of a common fund, certain sums upon a certain contingency, failing the contingency the fund to be restored to its members according to their subscriptions, less expenses, but the contingency did not occur, and the association passed a resolution directing the return of the subscriptions as aforesaid, it was held that an action for money had and received would lie against the treasurer having possession of the funds, brought by a member to recover the amount of his subscription, less his share of the expenses.⁵ The profits of a fair are required to be applied to the purposes for which the fair was held. Self-constituted trustees have no right to divert the fund from those purposes.⁶

§ 598. Membership—Rights, Powers, and Duties of Members.—A person becoming a member of an association and subscribing the constitution and by-laws, thereby accepting and assenting to the conditions pre-

¹ *Wolf v. Schlieffer*, 2 Brewst. 563; *Cheeny v. Clark*, 3 Vt. 431; 23 Am. Dec. 219.

² *Chick v. Trevett*, 20 Me. 462; 37 Am. Dec. 68.

³ *Fogg v. Virgin*, 19 Me. 352; 36 Am. Dec. 757.

⁴ *Reding v. Anderson*, 72 Iowa, 498.

⁵ *Koehler v. Brown*, 2 Daly, 78.

⁶ *Morton v. Smith*, 5 Bush, 467.

scribed, acquires such rights, with such limitations, as the articles of association provide for.¹ One who buys a share, and applies for and accepts membership, in an incorporated society for maintaining a theater, is bound by the regulations which the society has prescribed, designating stockholders' seats, and otherwise directing the manner of using the building.² The courts cannot compel the admission of an applicant for membership.³ Membership is not forfeited *per se* by non-user;⁴ nor by temporary membership in another association, in violation of a by-law of the original association, if acquiesced in by the company.⁵ The members of a voluntary association have no severable proprietary interest in the property of the association, or a right to any proportionate part of it, if they resign, forfeit their membership, or are expelled.⁶ They have merely the enjoyment and use of the property while members, and if they are then members, a right to a proportionate share of its assets when the association is dissolved.⁷ Where the association has no property, his membership alone gives the courts no jurisdiction to interfere.⁸ Where there is open to an expelled member of

¹ Hyde v. Woods, 94 U. S. 523; Fischer v. Raub, 57 How. Pr. 87; Palmetto Lodge v. Hubbell, 2 Strob. 457; 49 Am. Dec. 604.

² Johnson v. La Variete Assoc., 28 La. Ann. 421.

³ White v. Brownell, 3 Abb. Pr., N. S., 318; 4 Abb. Pr., N. S., 162; 2 Daly, 329.

⁴ Hamestead v. Wash. Fire Co., 1 Pa. Leg. Gaz. 392.

⁵ Hamestead v. Wash. Fire Co., 1 Pa. Leg. Gaz. 392.

⁶ McMahon v. Rauh, 47 N. Y. 67; 3 Daly, 116; Curtiss v. Hoyt, 19 Conn. 154; 48 Am. Dec. 149.

⁷ White v. Brownell, 4 Abb. Pr., N. S., 162; 2 Daly, 329.

⁸ In Rigby v. Connol, 28 Week. Rep. 650, where an injunction was asked and refused to prevent the expulsion of a member, the society having no property, the master of the rolls said: "There is no such jurisdiction that

I am aware of, reposed in any court of this country, at least in any of the Queen's courts, to decide upon the rights of persons to associate together when the association possesses no property. Persons may, and many persons do, associate together without any property in common at all. A dozen persons may agree to meet and play whist at each other's houses for a certain period, and if eleven of them refuse to associate with the twelfth any longer, I am not aware of any jurisdiction in any court to interfere. Or a number of scientific men may agree in the same way to meet at any place; but if the association has no property, and takes no subscriptions from its members, I cannot imagine that any court of justice could interfere with such an association if some of the members declined to associate with some of the others. That is to say, the courts never dreamt of en-

a voluntary association a remedy under its constitution and laws for a review of the proceedings for his expulsion, and in case of error for his restoration, and the association is not a partnership, equity will not interfere.¹ If a cotton exchange has the authority to act as an arbitration court under its charter, its awards are subject to be reviewed and examined, so far as the legal rights of the parties are concerned, by the judicial tribunals of the state, in the same manner as are the awards of other arbitrators.²

A member cannot maintain an action at law against the association, unless the right to do so was given by the conditions of the agreement under which the members were united into a body;³ neither can his assignee.⁴ But he may have a remedy against the individual members of the association in equity.⁵ The purchase of claims against an association, which fails of legal incorporation, by a member of the association, does not give him any right to sue the directors of the same, it being a partnership.⁶ The individual members have no power, except in their collective capacity, to dispose of the property or effects of the association, or of any supposed proportionate

forcing what I may call personal agreements, — that is, agreements strictly personal in their nature, whether they are agreements of hiring and service, being the common relation of master and servant, or whether for the purpose of pleasure or of scientific pursuits, or for the purpose of charity or philanthropy. No court of justice can interfere so long as there is no property the rights to which are taken away from the person complaining. Now, if that is the foundation of the jurisdiction, the plaintiff, if he succeeds at all, must succeed on the ground that some rights of property to which he was entitled have been taken away from him. That this is the foundation of the interference of the courts as regards clubs I think is quite clear, for if you look at the lord chancellor's judgment, in *In re St.*

James's Club, 2 DeGex, M. & G. 387, you will see that he puts it thus: that the member had an interest in the assets of the club. Similarly, in the case of *Hopkinson v. Marquis of Exeter*, 16 Week. Rep. 266, L. R. 5 Eq. 66, Lord Romilly starts with the right to the enjoyment of the club property; and the subsequent cases have gone on the same ground."

¹ *Olery v. Brown*, 51 How. Pr. 92.

² *Savannah Cotton Exchange v. State*, 54 Ga. 668.

³ *Halvicht v. Pemberton*, 4 Sand. 657; *Cheeny v. Clark*, 3 Vt. 431; 23 Am. Dec. 219.

⁴ *Bullard v. Kinney*, 10 Cal. 60; *McMahon v. Rauhr*, 3 Daly, 116; 47 N. Y. 67.

⁵ *Butterfield v. Beardale*, 28 Mich. 412; *Dennis v. Kennedy*, 19 Barb. 517.

⁶ *Coleman v. Coleman*, 78 Ind. 344.

part or interest therein.¹ Members of an unincorporated fire company have power to sell its personal property, and may, by vote, confer authority to sell upon a committee of their number.² Where the laws governing a voluntary unincorporated association provide a remedy within the association for any offense committed by its officers, no opposition by the officers to the authority under which they act in the performance of their functions, nor irregularity in the performance thereof, will authorize a part of the members of the association to secede, for the purpose of expelling its regularly elected officers, declaring their offices vacant, and constituting themselves successors.³ A court of equity will not, at the instance of the minority, compel the majority of the owners of the furniture of an Odd Fellows' hall to purchase the interests of the minority therein, nor to remove and sell the same, and divide the proceeds among all the owners, it appearing that the furniture is being used for the very purpose for which it was originally purchased.⁴ The relation of members of a voluntary unincorporated association is ordinarily such as to justify a court of equity, in order to settle their disputes respecting the distribution of a common fund, to treat them as partners.⁵ A member is not entitled to compensation for conducting the business of the association;⁶ though he may recover for services rendered to the association previous to his becoming a member of it.⁷

Where membership in an association is of pecuniary value, it is not such property as can be attached at the suit of a creditor of the member.⁸ A member of a volun-

¹ *McMahon v. Rauhr*, 3 Daly, 116.

² *Curtiss v. Hoyt*, 19 Conn. 154; 48 Am. Dec. 149.

³ *McCallion v. Hibernia Savings and Loan Society*, 70 Cal. 163.

⁴ *Robbins v. Waldo Lodge*, 78 Me. 565.

⁵ *Butterfield v. Beardsley*, 28 Mich. 412; and see *Mann v. Butler*, 2 Barb.

Ch. 362. Compare *Brown v. Dale*, L. R. 9 Ch. Div. 78; 25 Eng. Rep. 776.

⁶ *In re Fry*, 4 Phila. 129.

⁷ *Lucas v. Beach*, 1 Man. & G. 417.

⁸ *Pancoast v. Gowen*, 93 Pa. St. 66; *In Barclay v. Smith*, 107 Ill. 349, 47 Am. Rep. 437, it is said: "It may be said that a certificate of membership

tary association without a charter, organized for the purpose of affording its members facilities for the transaction of their business as stock-brokers, as the New York Stock Exchange, has no absolute property in his membership, or in the rights in the association accruing therefrom; but the same are dependent upon and subject to the conditions imposed by the laws of the association, consented to by the member when he joined. Under the constitution of the exchange, a member who has forfeited his membership on account of misconduct cognizable by its laws loses all his rights in the association, and it may

[here of a board of trade] has a large value, and hence ought to be regarded as property. It is true that the board requires a person who becomes a member to pay an initiation fee of five thousand dollars, and the evidence shows that a certificate of membership is regarded in the market as worth four thousand dollars, but this does not change the character of the right. A church organized under our statute may own property for the uses and privileges of its members, worth as much as the property possessed by the board of trade, and the right of a member to attend the meetings of the church and occupy a pew may be regarded as a high and valuable right, and yet the right of membership has never been regarded as property which may be subjected to the payment of the debts of a member. The same may also be said in regard to the membership in a Masonic lodge or a social club, and various other organizations of a similar character. There may be, and doubtless are, many privileges which a man may possess that are valuable to him which do not fall within the definition of property, and which may be enjoyed, but cannot be subjected to the payment of debts. A liquor dealer may be licensed to sell liquor at a certain place for a certain time, for which privilege he is required to pay one thousand dollars per annum. That privilege is worth to him much more than he is required to pay. But is that privilege property which may be sold on execution, or reached by a creditor's bill for the

payment of debts? We have never so understood the law. A peddler or auctioneer may be licensed to carry on their vocation within a certain district, for which they may pay a stipulated sum of money, the profits arising from the privilege of exercising the right may be much larger than can be earned by a person exercising the right to transact business on the floor of the board of trade, and yet we have never understood that such a privilege was liable to be seized and sold in satisfaction of debts. The attorney and physician are licenced to practice their professions; it costs money to obtain such a privilege; it may be, and is, a valuable right, and yet such a right cannot be taken by a creditor's bill and sold in satisfaction of a debt. The same may be said in regard to various other privileges which may be and often are conferred upon persons in different pursuits of life. A certificate of membership in the board of trade of Chicago empowers the person who is admitted as a member to attend the meetings of the board and deal in the various products of the country. This right to appear at a certain place and transact certain business in our judgment is not property, but it is a mere privilege conferred upon the member which cannot be reached and sold by the process of courts. It is a right which may be regarded as valuable, but which cannot be diverted or destroyed except by the board itself, for failure of its members to conform to the rules and regulations of the association."

dispose of his membership as it sees fit; as, by selling it and distributing the proceeds among his creditors in the exchange.¹ A provision in the constitution of the association, that a member upon failing to perform his contracts, or becoming insolvent, may assign his seat to be sold; and that the proceeds shall, to the exclusion of his outside creditors, be first applied to the benefit of the members to whom he is indebted, is not contrary to public policy.² Non-members who are creditors must be paid before the claims of members can be paid.³ A joint-stock association may be sued by one member for maintaining a nuisance.⁴

ILLUSTRATIONS. — A volunteer fire-engine company, who, owing to new municipal regulations, had ceased to extinguish fires, sold their engine and other personalty, leased their engine-house, and having several thousand dollars in the treasury, without any explained or avowed object passed a by-law by which they raised the monthly dues from twelve and a half cents to two dollars. In a proceeding by *mandamus*, at the suit of a member of the company whose name had been erased from the books for non-payment of the increased dues, *held*, that such a by-law was under the circumstances unreasonable, and that no member who did not assent was bound to pay the increased rate; *held, further*, that such member continued to hold rights in common with the other members, and that when the company was finally dissolved, and its property was to be distributed among its members, he was entitled to a share therein: *Hibernia Fire Engine Co. v. Com.*, 93 Pa. St. 264. The constitution of a voluntary medical society provided that if the annual dues were not paid by a certain time "the defaulter shall forfeit his membership, . . . and of this he shall be duly notified by the secretary," and that notice of the requirement should be served each year, and that on reading the roll of members any such defaulter "shall be immediately stricken from the roll." *Held*, that the non-payment of the dues at the specified time was not *ipso facto* a forfeiture of membership: *Medical and Surgical Society v. Weatherly*, 75 Ala. 248. A furnished the money with which a member of the Philadelphia Brokers' Board purchased his

¹ *Belton v. Hatch*, 109 N. Y. 593; 4 Am. St. Rep. 495.

² *Hyde v. Woods*, 94 U. S. 523; 2 Saw. 655.

³ *Babb v. Reed*, 5 Rawls, 151; 23 Am. Dec. 650.

⁴ *Saltzman v. Shults*, 21 N. Y. Sup. Ct. 256.

seat, and upon the death of the member A claimed an equitable ownership in the proceeds of the sale of the seat, as against the creditors of the member within the board who claimed the proceeds under their constitution and by-laws. *Held*, that A could not maintain his claim: *Thompson v. Adams*, 93 Pa. St. 55. Several persons unite in an enterprise for the purchase of land, which proves unsuccessful. *Held*, that one of the parties cannot claim from the others repayment for advances because of a clause in the agreement providing "for repayment of all sums advanced by him." Unless the other associates agree to repay the advances, such clause is to be construed as meaning that he is to be repaid out of the land or its proceeds: *Bell v. McAboy*, 3 Brewst. 81.

§ 599. **Liabilities of Members.**—The members stand in a relation to each other somewhat fiduciary in its character. Each member has a right to demand and expect from his associates good faith in all that relates to their common interests, and no one will be permitted to take to himself a secret and separate advantage to the prejudice of the others.¹ Thus one member cannot sell to the association property at a profit.² The members are individually liable, as partners, to third parties for all debts of the association.³ In Missouri it has been held that the members of a voluntary association for educational purposes are liable for the wages of a teacher hired by its acting president.⁴ So in Massachusetts, where an association formed for pigeon-breeding gave an exhibition, the members who had voted to hold it, or who had assented to it, were held liable in equity to the others for their share of the expenses.⁵ So where goods are furnished on the order of an agent of the association, with the concurrence and approbation of the members, they are liable

¹ *Getty v. Devlin*, 54 N. Y. 403.

² *Getty v. Devlin*, 54 N. Y. 403. But see *Densmore Oil Co. v. Densmore*, 64 Pa. St. 43.

³ *Wells v. Gates*, 18 Barb. 554; *Herod v. Rodman*, 16 Ind. 241; *Tappan v. Bailey*, 4 Met. 529; *Lynch v. Postlethwaite*, 7 Mart. (La.) 69; 12 Am. Dec. 495; *Gorman v. Russell*, 14 Cal.

531; *Taft v. Ward*, 106 Mass. 518; 111 Mass. 522; *Babb v. Reed*, 5 Rawle, 151; 28 Am. Dec. 650; *Davison v. Holden*, 55 Conn. 103; 3 Am. St. Rep. 40.

⁴ *Heath v. Goslin*, 80 Mo. 310; 50 Am. Rep. 505.

⁵ *Ray v. Powers*, 134 Mass. 22. But see *Volgor v. Ray*, 131 Mass. 510.

therefor.¹ Persons contracting in the name of an association which is unincorporated are personally liable.²

Each member continues liable so long as he remains a member, and after he ceases to be a member, and until notice to the creditors of the association of his withdrawal therefrom.³ If one of the members die, a creditor of the association must proceed and exhaust his remedy against the surviving members before he can maintain an action against the personal representatives of the deceased member.⁴ An action on a promissory note, signed by the directors as such, of a voluntary association, should be brought against all the members; though, in the absence of a plea in abatement for non-joinder, the action is maintainable against the signers alone.⁵ And one whose name was signed to the articles of association without authority or ratification may properly be omitted as a defendant.⁶ Under the statute of New York, the president or treasurer of any association consisting of seven or more members may sue or be sued, on behalf of such association, in any of the courts of the state.⁷ Nor is the operation of the statute confined to associations in the state, but it applies to all associations that come into court under it.⁸ A suspended member of an Odd Fellows' lodge is liable for all dues accruing after his suspension if the by-laws so provide.⁹

ILLUSTRATIONS. — The defendants with others associated themselves under the name of the Bridgeport Co-operative Association, unincorporated, and established a retail meat market. Their purpose was to sell to any person who would buy, regardless of membership, and to the members at such a price as would relieve them from paying at least one middle-man's profit. No profits were anticipated beyond payment of the

¹ *Robinson v. Robinson*, 10 Me. 240;

Ridgely v. Dobson, 3 Watts & S. 118.

² *Lewis v. Tilton*, 64 Iowa, 220; 52 Am. Rep. 436.

³ *Park v. Spaulding*, 10 Hun, 128.

⁴ *Moore v. Brink*, 4 Hun, 402.

⁵ *McCreary v. Chandler*, 58 Me. 537.

⁶ *Boyd v. Merrill*, 52 Ill. 151.

⁷ *Olery v. Brown*, 51 How. Pr. 92;

Schmidt v. Gunther, 5 Daly, 452.

⁸ *Clancy v. Terhune*, 1 City Ct. Rep.

239.

⁹ *Palmetto Lodge v. Hubbell*, 2

Strob. 457; 49 Am. Dec. 604.

expenses of management. The members held meetings and elected officers, and the latter employed the defendants as managers to conduct the business. As such managers, they bought and sold, paying the receipts to the treasurer. *Held*, that the individual members of the association were liable for goods sold to the association, upon request of the managers, although they never held themselves out as partners, or as being liable as individuals for the obligations of the association: *Davison v. Holden*, 55 Conn. 103; 3 Am. St. Rep. 40. An association was formed for the purpose of obtaining gold in California. By the articles each agreed to pay twenty-five dollars, to furnish an outfit for, and pay the expenses of, eight of their number, to be elected by the members, to go to California and labor for the association in procuring gold; and that from the products of their labor their expenses should be first paid, and of the residue one half should be divided among the eight, and the remainder among all the members. The eight, on arriving in California, sold their outfits, divided the proceeds, and each one took his own way. One of the eight returned to Ohio, and a bill was filed to compel him to account. *Held*, that the eight members of the association stood in the relation thereto of employees, and that their acts, on arriving in California, did not discharge them from any of their obligations to it: *Eagle v. Bucher*, 6 Ohio St. 295; 67 Am. Dec. 342. The managers of a company, supposing it to be duly incorporated, incurred liabilities pursuant to the authority given them by their associates. It appeared subsequently that the company never became incorporated. *Held*, that the associates of the managers must bear their *pro rata* share of the loss; and that subscribers who had paid for their stock in full, or had paid the double liability to which stockholders were once subject, were not exempted from further contribution, but, on accounting, should be allowed for such payments: *Richardson v. Pitts*, 71 Mo. 128. The officers of a Masonic lodge made a note for the purposes of the lodge, with the approval of the members, and before the note matured, the lodge made an unsuccessful attempt to convert itself into a corporation. *Held*, that the members of the lodge were liable on the note: *Ferris v. Thaw*, 72 Mo. 446.

§ 600. **Dissolution of.**—In case of violent dissensions and irreconcilable differences among the members, judgment will be rendered at the suit of one or more members against all the others, dissolving the association.¹ Where

¹ *Lafond v. Deems*, 52 How. Pr. 41; 5 Ark. 270; 39 Am. Dec. 376; *Danben* 1 Abb. N. C. 318; *Howell v. Harvey*, v. *Barber*, 14 Ohio, 315.

a voluntary association voted to transfer its funds to another society, appointed a committee to make the transfer, and ceased to meet for five years, it was held to be dissolved.¹ And excluding a member from the privileges of membership, or one elected an officer from the exercise of his office, may be ground for decreeing a dissolution.² But an association will not be dissolved upon proof of differences of opinion, bad temper, the ordinary disputes common to such societies;³ nor upon proof of injuries or injustice sustained by one member through the action or vote of the society, if he has another remedy.⁴ If the articles fix a definite time for the continuance of the association, the members cannot dissolve before that time, except by unanimous consent.⁵ A vote to dissolve an association and dispose of its property is not authorized by a notice of a special meeting which does not state the business to be transacted.⁶ On the dissolution of a voluntary association, the trustees cannot maintain replevin against one of its members to recover the common property.⁷

ILLUSTRATIONS.—The majority of the members of an unincorporated benevolent association which formed one lodge of a large number belonging to the same order, withdrew from the jurisdiction of the grand lodge of the state, surrendered the charter received by the lodge from the grand lodge, and formed a new lodge under the same name, while the remaining members continued in allegiance, and the charter was duly delivered to them, as constituting the lodge, by the grand lodge. *Held*, that the body composed of the members who had not withdrawn was entitled to recover the property of the lodge from the possession of the body formed by the withdrawing members: *Altman v. Berry*, 27 N. J. Eq. 331.

§ 601. **Clubs—In General.**—Clubs organized for social, literary, recreative, or other similar purposes, when

¹ *Penfield v. Skinner*, 11 Vt. 296; compare *Strickland v. Prichard*, 37 Vt. 324.

² *Gorman v. Russell*, 14 Cal. 531; 18 Cal. 633; *Berry v. Cross*, 3 Sand. Ch. 1.

³ *Fischer v. Raab*, 57 How. Pr. 87.

⁴ *Fischer v. Raab*, 57 How. Pr. 87; *Lafond v. Deems*, 8 Abb. N. C. 344.

⁵ *Von Schmidt v. Huntington*, 1 Cal.

55.

⁶ *St. Mary's Benev. Ass'n*, N.H. 1887.

⁷ *Hewett v. Hatch*, 57 Vt. 16.

not incorporated,¹ are not partnerships,² nor joint-stock companies.³ They are simply voluntary associations of individuals founded on contract, for the purpose of sharing certain mutual benefits.⁴

§ 602. **Rights of Members.**—The majority of the members of a club, at a meeting of which proper notice has been given, may bind the majority,⁵ except where the action is in conflict with the articles of association,⁶ or where property rights are concerned.⁷ A member is entitled to a share in the property of the club, which cannot be taken away except it is lost in a manner set out in the articles of association or by-laws,—as, for example, refusal to pay dues, etc.,—or by expulsion.⁸ This interest is equal and proportionate, but no member has any interest which can be separated and taken out of the whole for his use, until the joint affairs are settled, the association dissolved, and the mutual rights adjusted, and the shares of each determined.⁹ A court will not order the admission of an applicant to a club.¹⁰ Before one can be expelled from a club, he is entitled to notice and an opportunity to be heard, in accordance with its constitution and by-laws. Nor is it necessary that he should request to be heard.¹¹ Where the constitution of a club provides that a member may be expelled by a two-thirds vote of the governing committee, and that a ma-

¹ As they may be under the statutes of most of the states, in which case they are subject to the laws governing corporations.

² *Fleming v. Hector*, 2 Mees. & W. 172; *In re St. James Club*, 13 Eng. L. & Eq. 589; 2 De Gex, M. & G. 383; *McMahon v. Rauhr*, 47 N. Y. 69; *Lafond v. Deems*, 81 N. Y. 507; *Robertson v. Walker*, 3 Baxt. 316.

³ *In re St. James Club*, 13 Eng. L. & Eq. 589; 2 De Gex, M. & G. 383.

⁴ *Leach Club Cases*, 11.

⁵ *Smith v. Nelson*, 18 Vt. 511.

⁶ *Livingston v. Lynch*, 4 Johns. Ch. 573; *Austin v. Searing*, 16 N. Y. 112; 69 Am. Dec. 665.

⁷ *Austin v. Searing*, 16 N. Y. 112; 69 Am. Dec. 665.

⁸ As to expulsion from associations, see *ante*, Part I.

⁹ *McMahon v. Rauhr*, 47 N. Y. 69.

¹⁰ *White v. Brownell*, 4 App. Fr., N. S., 162. The right of a person, duly elected thereto, to sit as a new member of a Democratic county committee, a voluntary unincorporated political association, provided for by the constitution of the Democratic county organization, is one which the courts will not enforce: *McKane v. Adams*, N. Y. Sup. Ct. 1889.

¹¹ *Loubat v. Le Roy*, 40 Hun, 546.

majority of the members of the committee shall constitute a quorum, a two-thirds vote of a quorum of the committee as it existed at the time of the vote is sufficient, although there are vacancies in the committee. One of the governors of the club is not disqualified from taking part because he is a relative of the member whom it is sought to expel. The question of whether the moral conduct for which a member is expelled was such as to justify his expulsion cannot be reviewed by the courts, unless the action of the expelling committee appears to have been capricious or corrupt. A neglect to notify the member of the time when the committee's report will be presented and considered will not necessarily invalidate the expulsion if the member has been fully heard.¹

ILLUSTRATIONS.—An expelled member of the Union Club of New York brought an action to have the resolution of expulsion declared null and void. The government of the club was in charge of a committee, which had power to expel members from the club by ballot. A rule declared that the proceedings of the meetings of this committee should be strictly private. *Held*, that a member of the committee could not be interrogated as to what took place within the committee, nor as to his reasons for his vote, nor as to what he deemed proper and sufficient ground for the expulsion of a member; that the minutes and report in writing of the committee afforded the best evidence of what took place therein: *Loubat v. Leroy*, 65 How. Pr. 138.

§ 603. **Liabilities of Members.**—In England, a member of a club is not liable to a creditor of the club unless he has assented to the contract, and the officers have no authority to bind the members or pledge their credit.² But in this country it has been held that the members of a club are all jointly liable for the indebtedness of the club.³ "Where," said the court in this case, "a body of gentlemen join themselves together for social intercourse and pleasure, and assume a name, under which they com-

¹ *Loubat v. Le Roy*, 15 Abb. N. C. 1. *Fleming v. Hector*, 2 Mees. & W. 172; *Caldicott v. Griffith*, 8 Ex. 898.

² *In re St. James Club*, *supra*; ³ *Park v. Spaulding*, 10 Hun, 128.

mence to incur liabilities by opening an account, they become jointly liable for any indebtedness thus incurred; and if either of them wishes to avoid his personal responsibility by withdrawal from the body, it is his duty to notify the creditors of such withdrawal; otherwise, if a creditor continues to furnish in good faith articles such as have been previously purchased for the use of the club, his responsibility will continue, upon the same principle that holds retiring partners to liability for an indebtedness subsequently contracted with former creditors."¹

§ 604. Benefit Societies — In General — Powers and Liabilities of.—The purpose of benefit or friendly societies is not business, trade, or profit, but the benefit and protection of their members, as provided for in the constitution and by-laws.² Such societies are not insurance companies,³ nor are they to be regarded as institutions of public charity.⁴ A corporation for business purposes, having in view the gain and profits of its corporators, is not a benevolent society, although it may contemplate the promotion of the temporal interests of others.⁵ Nor where, in addition to aiding its sick or aged members, it also propagates trade unionism.⁶ But a benefit society may extend its benefits to the families of its members.⁷ A voluntary association formed for the benefit and protection of its members, but having no power to compel payment of dues, and whose right of membership ceases upon a failure to pay annual subscriptions, is not a partnership.⁸

¹ But see *Ebbinghousen v. Worth Club*, 4 Abb. N. C. 300.

² *Lafond v. Deems*, 8 Abb. N. C. 344.

³ *Countney v. Countney*, 4 Jones. But as to the insurance features of such societies, see *post*, Title Insurance.

⁴ *Morning Star Lodge v. Hayslip*, 23 Ohio St. 144; *Swift v. Benefit Soc.*, 73 Pa. St. 362.

⁵ *People v. Nelson*, 46 N. Y. 477.

⁶ *Hornby v. Close*, L. R. 2 Q. B. 153.

⁷ *Gundlach v. Germania etc. Ass'n*, 4 Hun, 339. Nothing in the New York statutes providing for the incorporation of societies requires benefits to be confined to the families or members; nor does a certificate of incorporation of a society whose object is stated to be to combine the efforts of members to effect mutual relief during their lifetime, and to their respective families when necessary: *Massey v. Rochester Mut. Relief Society*, 102 N. Y. 523.

⁸ *Lafond v. Deems*, 8 Abb. N. C. 344

In England and in many of the states such societies are regulated by statute,¹ and their purposes and objects are determined by the provisions of the special acts relating to them. A lodge incorporated in one state cannot appropriate any part of the money received from assessments to the relief of beneficiaries of other lodges of the same general order in other states.² Where a supreme lodge, without notice or hearing, suspends a subordinate lodge because of an erroneous belief that an assessment has not been paid, such suspension is of no force or effect.³ So where the only means which a subordinate lodge or a member of a benevolent association has of knowing when an assessment is due to the supreme lodge is by notice from the supreme lodge, unless notice is given no rights are lost.⁴ The charter of a mutual benefit association may limit the right of the assured to change the beneficiary.⁵ Where the rules of an association imply that notice shall be given on assessments becoming due, there cannot be a forfeiture of membership for non-payment without notice.⁶ Power given by the charter of a benevolent and loan association to loan money "upon personal security and the pledge of goods and chattels," authorizes loans upon personal security without any pledge of goods and chattels.⁷ Funds of a Free Mason lodge, accumulated under a by-law providing that they should be used "for the good of the craft, or for the relief of indigent and distressed worthy Masons, their widows and orphans," cannot on the dissolution of the lodge, by a vote of the acting members, be divided among themselves for their private use.⁸ But a mutual

¹ *Pare v. Clegg*, 29 Beav. 589; *State v. Mut. Protect. Ass'n*, 26 Ohio St. 19; *People v. Nelson*, 46 N. Y. 477.

² *Grand Lodge etc. v. Stepp*, S. C. Pa., 14 Pitts. L. J. 164.

³ *Hall v. Knights of Honor Supreme Lodge*, 24 Fed. Rep. 450.

⁴ *Hall v. Knights of Honor Supreme Lodge*, 24 Fed. Rep. 450.

⁵ *Presbyterian Mut. Assurance Fund v. Allen*, 106 Ind. 593.

⁶ *Covenant Mut. Benefit Ass'n v. Spies*, 114 Ill. 463.

⁷ *Mo. Loan Bank v. How*, 56 Mo. 53.

⁸ *Duke v. Fuller*, 9 N. H. 536; 32 Am. Dec. 392.

relief society for rendering relief to members and their families cannot, after having issued a certificate in favor of one not belonging to the family of a member, contend that it was without power to pay to him according to the terms of the certificate.¹ A benevolent society may hold business meetings or transact its business on Sunday.²

The by-laws of benevolent societies must be reasonable.³ A by-law withholding relief from the widows of members who die of intemperance or debauchery is reasonable.⁴ So is a by-law providing that relief should be furnished to sick members, but not where the sickness was the result of drunkenness or debauchery, or was unaccompanied by a physician's certificate.⁵ So is a by-law which provides for a forfeiture in case dues remain in arrears for three months.⁶ But by-laws are unreasonable and void which forfeit the widow's rights because the member's dues, though fully paid, were not paid at the right time.⁷

The franchise of a benevolent corporation will not be forfeited because of a failure to hold meetings, and collect dues for a short time, nor because of loss of members, enough remaining to supply vacancies and continue the succession, nor will mere mistakes or act of misuser or non-user warrant a judgment of ouster.⁸

ILLUSTRATIONS.—A by-law of a benevolent society provided that any subordinate lodge in arrears should stand suspended, and no death benefit should be paid if a death occurred during

¹ *Massey v. Rochester Mut. Relief Society*, 34 Hun, 254.

² *People v. Young Men's Soc.*, 65 Barb. 357.

³ See further *ante*, Title Corporations. Cases involving the rights of members to benefits under the constitution and by-laws of a benevolent voluntary association are to be determined with reference to such constitution and by-laws, which may be altered so as to reduce the amount due a sick member, and such an alteration, even if made during his sickness, does not neces-

cessarily impair the obligation of a contract: *Poultney v. Bachman*, 31 Hun, 49; 62 How. Pr. 466.

⁴ *St. Mary's Soc. v. Burford*, 70 Pa. St. 321.

⁵ *Harrington v. Workingmen's Benevolent Ass'n*, 70 Ga. 340.

⁶ *Skelly v. Private Coachmen's Benevolent Society*, 13 Daly, 2; *Cartan v. Benev. Soc.*, 3 Daly, 20.

⁷ *Buckley v. Robert Blum Lodge*, 1 City Ct. Rep. 51.

⁸ *State v. Société Republicaine*, 9 Mo. App. 114.

the suspension. *Held*, that the by-law was not to be construed as cutting off the right to receive the benefit except during the continuance of the suspension: *Knights of Honor Supreme Lodge v. Abbott*, 82 Ind. 1. The constitution of a benevolent association provided that "the manner of suspension for the non-payment of dues and assessments shall be detailed in the by-laws of every lodge, and is left to their option." *Held*, that a mere custom of procedure could not take the place of adoption of a by-law therefor: *District Grand Lodge v. Cohn*, 20 Ill. App. 335. Two benevolent societies, one of males and the other of females, having separate organizations but the same objects, united in purchasing a cemetery, each society contributing a moiety of the purchase-money, and for a time mutually participating in the use and profit of the property, although the title was taken to the officers of the male society. Afterwards a majority of the female went over to the male society. *Held*, that this did not deprive the female society of its rights of property resulting from the payment of half the price; and an injunction was issued accordingly: *Ladies' Benevolent Society No. 2 of Edgefield v. Benevolent Society No. 2*, 3 Tenn. Ch. 100. A voluntary association was formed for moral improvement, and relief in case of sickness or death. The constitution and by-laws provided for redress of grievances, and for punishment of parties offending; also for appeal to a higher tribunal. In an action by certain members to dissolve the association, because of its having taken a lease of more room than it required for its meetings, and sublet a portion, thereby accumulating a fund, *held*, that the action would not lie: *Lafond v. Deems*, 81 N. Y. 507; 8 Abb. N. C. 344.

§ 605. Rights of Members.—A member of a beneficial society does not stand in the relation of a creditor to the society, and can claim only such benefits as are prescribed by the by-laws existing at the time he applies for relief.¹ But when he, under his contract with it, is entitled to money, he may resort to the courts for the enforcement of his rights,² and cannot be deprived of this right by its by-laws.³ Certificates of membership issued by a benevolent society will not be declared not binding because inartistically framed, and in parts unintelligible when separated

¹ *St. Patrick's Male Beneficial Society v. McVey*, 92 Pa. St. 510; *McCabe v. Father Matthew Society*, 24 Hun, 149.

² *Bauer v. Samson Lodge*, 102 Ind. 262.

³ *Chosen Friends v. Garrigus*, 104 Ind. 133.

from the context and from attendant circumstances, if they can be made definite by reading them in connection with instruments referred to, or by the aid of parol testimony.¹ A member of a voluntary benevolent association may withdraw therefrom without the consent of the association.² It has been held that a member of a mutual benefit association may change his beneficiary at any time, for before the member's death the beneficiary has no vested right,³ unless, of course, the organic law of the society forbids it.⁴ But the contrary is held in Massachusetts.⁵ One who has designated a beneficiary to receive after his death a benefit from a benefit fund can designate another only in the manner required by the rules of the association.⁶ Where a certificate of membership in a benevolent association is, by its terms, assignable only when the assignment is approved by the secretary, an assignment without such approval is invalid.⁷ Where a member may require the payment of his death benefit "to his family, or as he may direct," he may designate a person not his wife, heir, or member of his family.⁸ In Massachusetts he cannot designate his "estate" as the object of the money payable at his death.⁹ A creditor of a member of a beneficiary association is not a "dependent."¹⁰ An invalid designation of beneficiaries does not render the certificate void.¹¹

Where the by-laws provide for the payment of an allowance to a sick member, the latter may sue for the amount if the by-laws do not provide a tribunal to settle questions

¹ St. Clair County Benevolent Soc. v. Pietsam, 97 Ill. 474.

² Borgraefe v. Supreme Lodge, 26 Mo. App. 218.

³ Mutual Benefit Society v. Burkhardt, 110 Ind. 189.

⁴ Gentry v. Knights of Honor, 23 Fed. Rep. 718.

⁵ Elsey v. Association, 142 Mass. 224.

⁶ Renk v. Herrman Lodge, 2 Dem-

arest, 409; Ireland v. Ireland, 42 Hun, 212.

⁷ Harman v. Lewis, 24 Fed. Rep. 97, 530.

⁸ Mitchell v. Grand Lodge, 70 Iowa, 360.

⁹ Daniels v. Pratt, 143 Mass. 216.

¹⁰ Skillings v. Massachusetts Benevolent Soc., 146 Mass. 217.

¹¹ Rindge v. New England etc. Soc., 146 Mass. 286.

arising between the members and the society.¹ An agreement in its charter by a lodge of the Knights of Pythias to pay benefits to a member whose dues were paid up constitutes a contract on which an action at law could be maintained.² Where the contract between a benevolent aid association and its individual members is for the payment, upon the death of a member, of a sum of money to his devisees, and such member dies intestate, the administrator is not entitled to recover such amount from the association.³ Where, under its by-laws, a benevolent society has decided that a member is not entitled to benefits, the decision is conclusive, and will not be reversed or questioned by the courts.⁴ The levy and acceptance of assessments, after a conditional acceptance of an overdue payment, is a waiver of the right to avoid a certificate for delay in payment.⁵ On the death of a member of a beneficial association, the share in the common fund going to his family is not assets of his estate, governed by his will or the statute of distributions,⁶ but is to be distributed in the amounts and order which the regulations of the association direct.⁷ Members of a lodge of Odd Fellows are not liable to action at law for recovery of funeral benefit, by the next of kin of a deceased member, under their constitution and by-laws, which provide that "in case of the death of a brother, . . . there shall be paid to the nearest of kin of such brother a sum of not

¹ *Dolan v. Court Good Samaritans*, 128 Mass. 437; *Poultney v. Bachman*, 62 How. Pr. 466; 10 Abb. N. C. 252.

² *Magee v. Clayton Lodge*, 5 Del. 453.

³ *Worley v. Northwestern Masonic Aid Assoc.*, 3 McCrary, 53.

⁴ *Osceola Tribe etc. v. Schmidt*, 57 Md. 98; *Anacosta Tribe No. 12 v. Marbach*, 18 Md. 911; 71 Am. Dec. 625.

⁵ *Rice v. New England etc. Soc.*, 146 Mass. 248; *Rindge v. New England etc. Soc.*, 146 Mass. 286.

⁶ *Arthur v. Odd Fellows' Ben. Soc.*, 29 Ohio St. 557. The constitution of a voluntary association provided for a

trust fund, from which, on a member's death, a certain sum was to be paid to such person or objects as he might have designated in writing, or if no written disposition was made by him, then to certain specified persons. The payment was declared to be an absolute donation, free from all other claim or control. Held, that it formed no part of the estate of a deceased member, and was not recoverable by his administrator: *Swift v. San Francisco Stock and Exchange Board*, 67 Cal. 567.

⁷ *Arthur v. Odd Fellows' Soc.*, 29 Ohio St. 557.

less than thirty dollars, to defray the expense of his burial, which shall be paid over without delay.”¹

ILLUSTRATIONS. — By the charter of a benevolent association, the interest of a member in the “benefit fund” might be paid as he should direct. The constitution provided that the direction as to whom the benefit should be paid might be made by entry upon a record-book, whereupon a certificate should issue accordingly, and that the entry might at any time be changed. A member took out a certificate in favor of his wife, and afterwards another in favor of his daughter. After his death, *held*, that the daughter was entitled to the fund: *Tennessee Lodge v. Ladd*, 5 Lea, 716. Under the contract the beneficiary was to be paid, in ninety days from proof of the member’s death, “a sum equal to the amount received from a death assessment, but not to exceed” a certain sum. *Held*, in the beneficiary’s action against the association, that the promise to pay was absolute, and not contingent on the procuring of the funds by assessment: *Freeman v. National Ben. Society*, 42 Hun, 252. A member was asked to whom he wanted the benefit paid when he died, and he answered, “To my heirs,” and to a second question, “Wife or daughters.” His wife and one daughter survived him. The by-laws directed the payment to the widow if there was no designation. *Held*, that, whether there was a valid designation or not, the widow was entitled to the whole fund: *Addison v. New England Commercial Travelers’ Assoc.*, 144 Mass. 591. The constitution of a benevolent society provided that “the weekly benefits in case of sickness shall be five dollars”; and a by-law, “when any member takes sick . . . and is not able to attend to his daily labor,” said benefit shall accrue. *Held*, not to apply to a case of permanent bodily injury not affecting the general health, as for instance, a fracture of the thigh, with shortening of the leg and eversion of the foot: *Kelly v. Ancient Order of Hibernians*, 9 Daly, 289. The by-laws of a benevolent association provided that, to make up the amount due to the nominee of a deceased member, each member should pay a dollar, and that the nominee should be entitled to receive the amount collected. *Held*, that the amount actually collected was all that the nominee was entitled to, and not a sum equal to a dollar from each member: *Re Solidarite Mutual Beneficial Assoc.*, 68 Cal. 392. A member designated his wife and her lawful heirs as his beneficiaries. Afterwards the wife died, and the member married again. *Held*, that his daughter by his first wife was entitled to the benefit, and not his second wife: *Day v. Case*, 43 Hun, 179. A statute, in defining the right of

¹ *Payne v. Snow*, 12 Cush. 443; 59 Am. Dec. 203.

membership in a corporation chartered for mutual benefit, provided that the membership "may" be extended to a certain class. A by-law extended the membership to a designated part of that class. *Held*, that one belonging to the class, but not to the part designated by the by-law, was not a member: *Burbank v. Boston Police Relief Assoc.*, 144 Mass. 434. The charter of a benevolent mutual association provided that on the designation "being changed by death," or otherwise being rendered impossible, the fund should go in certain specified channels, first, to the member's widow, etc. A member designated his brother as his beneficiary. The brother died, and the member then designated his wife. *Held*, that she, and not the brother's administrator, was entitled to the fund: *Van Bibber v. Van Bibber*, 82 Ky. 347. The constitution of a benevolent society provided that death benefits were payable to the member's "family or his heirs." A member's application directed that the benefit should be paid to his four children, whose names were given. The certificate recited that the benefit should be paid "to his children." He married again and had another child. *Held*, that this child was entitled to share: *Thomas v. Leake*, 67 Tex. 469. A widow, separated from her husband in pursuance of a mutual understanding, and at his death bearing no part of the funeral expenses, *held*, not to be entitled to receive a bounty of twenty-five dollars, provided for in a by-law of a beneficial society, to be paid to the deceased member's widow or relatives: *Berlin v. March*, 82 Pa. St. 166. By the rules of a benevolent society, a sum was payable, upon the death of a member, to his widow, children, or such persons to whom he might have disposed of the same by will or assignment; and if there should be no widow or children, and no disposition by will or assignment, the fund should go to the permanent fund of the society. A member died unmarried and without issue, and by his will gave the "entire residue" of his "estate" after payment of debts and funeral expenses to his three sisters. *Held*, 1. That the fund due from the society was not assets recoverable by his administrator or executor, but only the subject of a power; and 2. That the will was not an exercise of the power, and therefore the fund went to the society: *Maryland Mutual Benevolent Society v. Clendinen*, 44 Md. 429; 22 Am. Rep. 52. A member brought suit to recover certain allowances on account of sickness. The sixteenth article of defendant's by-laws provided that any member who might become sick, lame, or infirm, and incapable of following his usual task, occupation, or employment, should be entitled to a certain weekly allowance; the seventeenth article provided that such allowance should not be paid until the chief ranger or secretary had received a certificate, signed by the surgeon of the court or by a qualified

surgeon, stating the illness of the member, or, if beyond a certain distance, by the attending surgeon; and that one should be sent each week during the sickness, etc. During the first week of plaintiff's sickness, he sent to the secretary a certificate stating his sickness, which was signed by the attending surgeon, the plaintiff being beyond the distance aforesaid; and a letter from the plaintiff accompanied the certificate, in which he spoke of it as the "doctor's note to certify that I have been sick, and that I am sick," though the signer of this certificate did not designate himself as a surgeon or physician. The plaintiff did not send any other certificate during his sickness, until some time in September, 1878, when he furnished a certificate that he had been sick since June 13, 1878. *Held*, that the certificate first sent sufficiently complied with the requirements of the by-laws, and that the plaintiff was therefore entitled to the allowance for one week; that the sending of this certificate was a condition precedent, and that the second certificate did not comply with the by-laws so as to entitle the plaintiff to any further allowance. Whether if the plaintiff had been rendered incapable, by an act of God, of sending the required certificates the rights of the parties would have been changed, *quære: Dolan v. Court Good Samaritans*, 128 Mass. 437. An applicant in a society to assist "widows, orphans, or other relatives of deceased members" designated his mother as beneficiary. He subsequently married, and his wife survived him. *Held*, that the designation was not revoked by his marriage: *Mass. Forrester v. Callaghan*, 146 Mass. 391. A statute prohibits the payment of benefits to any one not "a member of the member's family, or dependent on him." *Held*, that an army comrade and old friend who had lived at the house of the member for several years, and was disabled physically and dependent on others for support, was not within the term: *Supreme Lodge v. Nairn*, 60 Mich. 44. The by-laws of a benefit society provided that certain benefits should be paid to the person designated by the member in his application for membership, or last legal assignment, provided such person was an heir or member of his family. A member designated his wife, but she afterwards obtained a divorce from him, when he changed the designation to his son and a married sister, not a member of his family or supported by him. *Held*, that the benefit on his death went to the son: *Tyler v. Odd Fellows' etc. Ass'n*, 145 Mass. 134. A member directed that his wife receive the benefits conferred by the charter upon the legal representatives of members dying. She died before him. *Held*, that his representatives should be preferred to hers: *Expressmen's Aid Society v. Lewis*, 9 Mo. App. 412. A member was entitled to a benefit while "incapable of working." *Held*, that the mere fact of his doing two days'

work after a sickness did not show him not to be incapable of working then and afterwards: *Genest v. L'Union St. Joseph*, 141 Mass. 417.

§ 606. **Liabilities of Members.**—A member of a mutual benefit association incurs a binding obligation to pay assessments by his acceptance of a certificate of membership, and such assessments may be recovered by suit.¹ The constitution and by-laws of a voluntary charitable association, such as an Odd Fellows' lodge, are of no legal validity and effect, except as contracts, and are binding only on members who are shown to have personally assented to them.² The constitution of a grand lodge of Odd Fellows is not binding on the members of an unincorporated subordinate lodge who are not shown to have subscribed it, unless it is adopted by the constitution of the subordinate lodge which such members have subscribed.³ Where the society's records and the secretary's testimony show a member to have been in arrears on a certain date, such evidence is not overcome by his loose statements from memory.⁴ Members of an unincorporated association known as a lodge of the Knights of Pythias are jointly and severally liable to pay an amount due to a member on account of his illness.⁵ The sum payable upon the death of a member of a beneficiary association is not attachable by trustee process, while in the hands of the association; and this is so, though the person to whom the certificate was issued was not in fact a member of the corporation issuing it, and though its funds were not obtained in compliance with the law regulating such associations.⁶

ILLUSTRATIONS.—W. secured a benefit certificate in favor of his wife. He failed to pay the required assessments, and the

¹ *McDonald v. Ross-Lewin*, 29 Hun, 87.

² *Austin v. Searing*, 16 N. Y. 112; 69 Am. Dec. 665.

³ *Austin v. Searing*, 16 N. Y. 112; 69 Am. Dec. 665.

⁴ *Coyne v. New York Longshoremen's Assoc.*, 13 Daly, 1.

⁵ *Protchett v. Schaefer*, 11 Phila. 166.

⁶ *Saunders v. Robinson*, 144 Mass. 306.

certificate was renewed in the name of his creditor. *Held*, after W.'s death, that the creditor could not subject the money received to the payment of additional claims against W., which came to the creditor's hands after the renewal: *Levy v. Taylor*, 66 Tex. 652.

§ 607. **Forfeitures—Expulsion.**—Benevolent societies have the power of expelling members, but only for cause, and after notice and hearing.¹ A member of a beneficial society is entitled to personal notice and a hearing before expulsion. And if not notified, he cannot be lawfully expelled, even though present at the trial.² Likewise, the offenses charged must be stated as found after a formal investigation, and not rest on inference alone.³ Defamation of one member by another is no ground for expulsion unless without cause.⁴ A member cannot be expelled for non-payment of dues without a notice of their assessment.⁵ One who has been illegally expelled from an unincorporated voluntary benevolent association may maintain an action against its president to compel restoration to membership. If the rules of the association failed to provide for notice of the proceedings for expulsion, they were unreasonable, and the member, notwithstanding them, was entitled to notice and to an opportunity to be heard. Weekly payments which the member declared himself entitled to because of sickness, and of which he claimed that he was unjustly deprived during the period of his expulsion, cannot, however, be recovered, the association, in the absence of fraud, being the sole judges of the propriety of making such payments.⁶ A member does not forfeit his membership by not paying an assessment not made in accordance with the constitu-

¹ See *ante*, Title Corporation; *Smiths' Society v. Vandyke*, 2 Whart. 309; 30 Am. Dec. 263; *Society v. Meyer*, 52 Pa. St. 131; *Com. v. Pike Ben. Soc.*, 8 Watts & S. 247.

² *Downing v. St. Columba's Society*, 10 Daly, 262; *Wachtel v. Noah Widows' Soc.*, 60 How. Pr. 424.

³ *Schweiger v. Voightlander Ben. Ass'n*, 13 Phila. 113.

⁴ *Allnut v. Subsidiary High Court*, 62 Mich. 110.

⁵ *Knights of Honor Lodge v. Johnson*, 78 Ind. 110; *Payne v. Rochester Mut. Soc.*, 17 Abb. N. C. 53.

⁶ *Fritz v. Muck*, 62 How. Pr. 69.

tion of the order. And the fact that the assessment was made in accordance with a custom of which he is not shown to have had knowledge is of no consequence.¹ Where the intent appears from the by-laws of a mutual aid association to be that the mailing of the notice of an assessment shall fix the liability of the member, his rights may be forfeited, although through a miscarriage of the mail the notice failed to reach him.² Under a provision that a member's rights shall not be forfeited until his dues are six months "in arrears," the six months begins to run from the time the assessments actually become due, although it is the practice to pay them before they are due.³ Where the by-laws provide that on refusal or neglect to pay an assessment the member shall cease to be such, and the secretary shall strike his name from the roll, he ceases to be a member although the secretary does not strike his name from the roll.⁴ When the by-laws of such an association provide that if a member neglects for thirty days to pay assessments or dues his membership shall cease and determine without notice, and his claims upon the association be forfeited, no action can be maintained for recovery of an assessment, the payment of which has been thus neglected, as the membership is, *ipso facto*, terminated.⁵ Notice by a member of a Masonic lodge, when summoned for trial, to the presiding officer, that he could not be present at the time fixed, owing to certain duties as county surveyor, does not oust the lodge of jurisdiction then to try the charges.⁶ *Mandamus* lies to restore a member of a benevolent society illegally suspended from membership.⁷ Bringing an action for damages for expelling one from membership in a society, and recovering

¹ Underwood v. Iowa Legion of Honor, 66 Iowa, 134.

² Weakley v. Northwestern Ben. etc. Ass'n, 19 Ill. App. 327.

³ Wiggan v. Knights of Pythias, 31 Fed. Rep. 122.

⁴ Rood v. Ass'n, 31 Fed. Rep. 62.

⁵ McDonald v. Ross-Lewin, 29 Hun, 87.

⁶ Robinson v. Yates etc. Lodge, 86 Ill. 598.

⁷ Allnut v. Subsidiary High Court, 62 Mich. 110.

judgment, is a waiver of a right to be restored by *mandamus*.¹ In the absence of any showing of fraud, a member of a benevolent association cannot, on his expulsion, recover for the initiation fees voluntarily paid by him.² An appeal by a member of a lodge of the Knights of Honor from a judgment of expulsion to the grand dictator does not abate by the appellant's death pending appeal.³ The beneficiaries of a member of a benevolent society who stands suspended for non-payment of assessments, by operation of the laws of the society, at the time of his death, cannot recover on the benefit certificate, on the ground that the subordinate lodge of which he was a member had continued to treat him as a member, and to treat his unpaid dues to the supreme lodge as dues payable to the subordinate lodge, for which it had extended him credit.⁴

ILLUSTRATIONS.—A member of a workingmen's benevolent society was accused of violating a rule of the society, by working in the place of a brother member who had been discharged for upholding the laws of the society, the penalty provided for such act being fine or expulsion. The rules of the society provided that no member should be expelled without notice and a hearing. Relator, without notice or opportunity to be heard, was both fined and expelled. *Held*, that the expulsion was unlawful: *Doyle v. New York etc. Society*, 6 Thomp. & C. 85; 3 Hun, 361. Plaintiff, who six years before had been expelled from a benevolent society, brought suit to be restored to membership. It appeared that he previously had sued for certain benefits, and that the suit had been determined against him, on the ground that he had been expelled. *Held*, that the former suit constituted an effectual bar to his proceeding for a restoration to membership: *Bachmann v. New Yorker Deutscher Arbeiter Bund*, 12 Abb. N. C. 54; 64 How. Pr. 442. The by-laws of a benevolent association provided that a member who should fail to pay an assessment should be suspended, but that a payment within three months should reinstate him. Another provision of the by-laws provided for the action of the association in cases where members delinquent for more than three

¹ *State v. Lipa*, 28 Ohio St. 665.

² *Marck v. Lodge*, 29 Fed. Rep. 896.

³ *Robinson v. Yates City Lodge etc.*, 86 Ill. 598.

⁴ *Borgraefe v. Knights of Honor*, 22 Mo. App. 127.

months should desire to pay and obtain a restoration of their rights. A member, delinquent for less than three months, paid an assessment while on his death-bed. *Held*, that his rights were thus restored without action on the part of the association: *Manson v. Grand Lodge*, 30 Minn. 509. A member who was habitually late in paying his assessment was reinstated in many instances, the forfeiture being waived by the association on proof of continued good health. *Held*, that the association, by its conduct, was not precluded from subsequently insisting on a forfeiture for a default in payment: *Crossman v. Massachusetts Benefit Ass'n*, 143 Mass. 435. Plaintiff claimed of his lodge certain benefits because of his disabilities, which benefits were granted by the grand master, but from which decision the lodge appealed to the grand lodge, pending which plaintiff, convicted of feigning said disabilities, also appealed to the grand lodge, which decided against him. *Held*, that this was an adjudication of the question involved in the first appeal: *Woolsey v. Odd Fellows' Lodge*, 61 Iowa, 492. The by-laws of a voluntary association provided for striking from the roll members in arrears for dues, after notification and neglect to pay, and for fines for omissions of members to give notice of change of residence. On joining, the plaintiff's intestate gave notice of his residence, but subsequently changed his residence without giving notice. He was struck from the rolls for failure to pay dues, without notice to him. *Held*, that the plaintiff was nevertheless entitled to recover the amount made payable on the intestate's death by the by-laws: *Wachtel v. Noah Widows' and Orphans' Society*, 84 N. Y. 28; 38 Am. Rep. 478. A subordinate lodge sent to the grand lodge A's assessment, although A had not paid it. A was not suspended for non-payment, although under a by-law he might have been. He died without having paid the assessment. *Held*, that his death benefit was due from the grand lodge: *Scheu v. Grand Lodge*, 17 Fed. Rep. 214.

PART VII.—RELIGIOUS SOCIETIES AND CORPORATIONS.

CHAPTER XXXIV.

RELIGIOUS SOCIETIES AND CORPORATIONS.

- § 608. Religious societies and corporations—What are—How incorporated.
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- § 610. The “church” and “society” distinguished.
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- § 620. Jurisdiction of civil courts—Personal rights—Property rights—Decisions of church courts.
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§ 608. Religious Societies and Corporations—What are—How Incorporated.—Religious societies or corporations in the United States are not regarded as ecclesiastical corporations in the sense of the English ecclesiastical law, but are, on the contrary, ordinary civil associations or corporations for the advancement or carrying on of religious purposes, governed by the rules of the common law and the laws of the state.¹ Religious societies are incorporated under the general statutes of the states authorizing their formation.² That the yearly meeting of Quakers kept records, had a clerk and treasurer, received contri-

¹ Bishop of Natal v. Gladstone, L. R. 3 Eq. 1; Robertson v. Bullions, 11 N. Y. 243; Watkins v. Wilcox, 4 Hun, 220.
² Methodist etc. Church v. Sherman, 36 Wis. 404; Van Buren v. Reformed Church, 62 Barb. 495; Attorney-Gen-

eral v. Clergy Society, 8 Rich. Eq. 190. In Missouri the application need not be signed by all the members. North St. Louis Church v. McGowan, 62 Mo. 279.

butions, exercised general supervision over the spiritual concerns of the Quakers, celebrated marriages, and admitted and discarded members, does not prove that it was a corporation.¹ In Massachusetts, a congregational church, or a church formed within the congregation by covenant and according to usage, to celebrate the Christian ordinances, and for ecclesiastical purposes, with deacons chosen by the members, is not a corporation.² The provisions of the statute should be substantially followed, and its express requirements complied with;³ but for some purposes, the formal requisites to organization under the statute will be presumed, although they do not appear by the certificates filed.⁴ Incorporation is proved by showing a certificate of organization, and acts of user under it.⁵ That the certificate has no seal is not necessarily fatal.⁶ The incorporation of a religious society transfers all the rights and interests of individual members to the corporation,⁷ and likewise all property held in trust for it.⁸ Two or more separate and distinct churches cannot in Wisconsin be organized into one corporation.⁹ In Massachusetts, it is held that the legislature is not prevented from making new religious incorporations, or from setting off the members of any religious incorporation to another incorporation, whether of the same denomination of Christians or not.¹⁰ Where real estate is conveyed to trustees for the use of a church or congregation as a place of worship, and such church or congregation is afterwards incorporated to enable the corporation to take and hold the legal title, it will be presumed, after a great lapse of time, that there

¹ *Greene v. Dennis*, 6 Conn. 293; 16 Am. Dec. 58.

² *Jefts v. York*, 10 Cush. 392.

³ *Ferraria v. Vasconcelles*, 23 Ill. 456.

⁴ *All Saints Church v. Lovett*, 1 Hall; 191.

⁵ *Willard v. Methodist Church*, 66 Ill. 55; *Jackson v. Leggett*, 7 Wend. 377.

⁶ *St. Jacobs Lutheran Church v. Bly*, 73 N. Y. 323.

⁷ *North St. Louis Church v. McGowan*, 62 Mo. 279. Catholic churches in this country are not corporations. The title to their property is vested in the reigning bishop of the diocese individually.

⁸ *First Baptist Church v. Witherell*, 3 Paige, 296; 24 Am. Dec. 223.

⁹ *Evenson v. Ellingson*, 67 Wis. 634.

¹⁰ *Thaxter v. Jones*, 4 Mass. 570.

was a conveyance of the legal title from the trustees to the corporation.¹

§ 609. **The Name.**—The name of the society may be changed without affecting the identity of the corporation.² The fact that a religious sect assumes a strictly sectarian or denominational name affords a presumption that it was formed for the purpose of promoting the vital and fundamental doctrines of such sect.³ And the corporate name of the society will be presumed to be the one in which a mortgage was executed by the trustees.⁴ The term "Protestant," as used in the constitution of New Hampshire, means all Christians who deny the authority of the pope of Rome; it does not include Mohammedans, Jews, pagans, or infidels.⁵ The court will not approve of a charter for a church with a name so like another church in the same place that one may be taken for the other.⁶

§ 610. **The "Church" and "Society" Distinguished.**—There is, among many of the denominations of Christians, a distinction between the "church" and the "society"; the former embracing only those who are members of the church, received into it according to certain forms, and taking the sacrament as an evidence of their belief; the latter including those who are associated for the purpose simply of maintaining worship.⁷ The existence of

¹ Reformed Protestant Church v. Mott, 7 Paige, 77; 32 Am. Dec. 613.

² Cahill v. Bigger, 8 B. Mon. 211; First Society v. Brownell, 5 Hun, 464; Wardens v. Hall, 22 Conn. 125.

³ Attorney-General v. Dublin, 38 N. H. 459; Hale v. Everett, 53 N. H. 9; 16 Am. Rep. 82.

⁴ Kendallville M. E. Church v. Shulze, 61 Ind. 511.

⁵ Hale v. Everett, 53 N. H. 9; 16 Am. Rep. 82.

⁶ First Presbyterian Church, 2 Grant Cas. 240.

⁷ First Baptist Church v. Witherell,

3 Paige, 296; 24 Am. Dec. 223. See Harden v. Trustees, 51 Mich. 137; 47 Am. Rep. 355. "A church is understood among those whose polity is congregational or independent to be a body of persons associated together for the purpose of maintaining Christian worship and ordinances. A religious society is a body of persons associated together for the purpose of maintaining religious worship only, omitting the sacraments. A church and society are often united in maintaining worship, and in such cases the society commonly owns the property and makes the pecuniary contract

the church proper as an organized body is not recognized by law, nor does its existence or non-existence, or its denominational character or connections, affect in any manner the legal nature of the corporation,—the society.¹ The members of the society are the corporators.² The society may decide, without interference from the pew-owners, what doctrines shall be preached in the house, and who shall preach them.³ Members of the church have no other or greater rights as corporators than any other members of the society who stately attend with them for the purposes of divine worship.⁴ Members of the church excluded for heresy may still not only be voters as members of the congregation, but may be also elected trustees, and have the management of the temporal concerns of the congregation.⁵ The courts have no jurisdiction over the church, or the members thereof, as such,⁶ except to preserve the peace and protect the civil rights of all persons connected with the body;⁷ and such tribunals will not, of course, interfere to compel an individual to attend worship at any place, nor to remain connected with any church, nor to receive any one as his pastor.⁸

§ 611. Powers of Majority of Corporators.—A majority of the members of the corporation have a right to control the corporate body free from all ecclesiastical interference.⁹

with the minister. But in many instances societies exist without a church, and churches without a society": *Silby v. Barlow*, 16 Gray, 329.

¹ *Petty v. Tooker*, 21 N. Y. 268; *Gram v. Evangelical etc. Soc.*, 36 N. Y. 161; *Watkins v. Wilcox*, 66 N. Y. 654.

² *Robertson v. Bullions*, 11 N. Y. 243; *Wyatt v. Benson*, 4 Abb. Pr. 182; *Baptist Church v. Witherell*, 3 Paige, 296; 24 Am. Dec. 223; *Worrell v. First Presbyterian Church*, 23 N. J. Eq. 96.

³ *Trinitarian Cong. Soc. v. Union Cong. Soc.*, 61 N. H. 384.

⁴ *First Baptist Church v. Witherell*, 3 Paige, 296; 24 Am. Dec. 223.

⁵ *First Baptist Church v. Witherell*, 3 Paige, 296; 24 Am. Dec. 223.

⁶ *Lawyer v. Cipperly*, 7 Paige, 281; *Baptist Church v. Witherell*, 3 Paige, 296; 24 Am. Dec. 223.

⁷ *Grimes v. Harmon*, 35 Ind. 198; 9 Am. Rep. 690; *Watson v. Avery*, 2 Bush, 332; *Lucas v. Case*, 9 Bush, 297; *State v. Hebrew Cong.*, 30 La. Ann. 205; 33 Am. Rep. 217.

⁸ *Feizel v. Trustees etc.*, 9 Kan. 592.

⁹ *Watkins v. Wilcox*, 4 Hun, 220; 66 N. Y. 654; *Petty v. Tooker*, 21 N. Y. 267; *Sutter v. Trustees*, 42 Pa. St. 503; *Miller v. English*, 21 N. J. L. 317; *Henry v. Diebrich*, 84 Pa. St. 286; *Deaderick v. Lampson*, 11 Meak. 523. But see sec. 617, *post*.

The minority are bound, and must either submit or withdraw.¹ The majority may sell the church property to pay its debts;² may compromise a suit against the society;³ may change the denomination of the church or its mode of worship when they please.⁴

§ 612. Powers of Religious Corporations.—A religious corporation has power to hold property, real and personal.⁵ It may acquire title to land by adverse possession under color of title.⁶ But the acquisition of property and the holding and disposal of it by religious corporations are regulated for the most part by the statutes incorporating them.⁷ A religious society has power to mortgage its personal property to secure its debts.⁸ But it cannot sell and convey its real property without the authority of some enabling statute;⁹ and an unauthorized conveyance by the society of its real property cannot be held valid, although fully executed by delivery of possession and receipt of the purchase-money.¹⁰ And to constitute a sale of the real property of a religious society, within the meaning of the New York statute, there must be a valuable consideration inuring to the corporation as such.¹¹ The corporation should bring suit in its own name, and not in the name of its trustees.¹² An unincorporated religious

¹ *Miller v. English*, 21 N. J. L. 317.

² *Eggleston v. Doolittle*, 33 Conn. 396.

³ *Horton v. Baptist Church*, 34 Vt. 309.

⁴ *Keyser v. Stansifer*, 6 Ohio, 363; *Watkins v. Wilcox*, 66 N. Y. 654; *Parish of Bellport v. Tooker*, 29 Barb. 256. But a church charter will not be amended so as to alter its original principles if the minority object: *In re Hebron etc. Church*, 9 Phila. 609.

⁵ *Boone on Corporations*, sec. 275.

⁶ *Ref. Church v. Schoolcraft*, 65 N. Y. 134; *In re Roman Catholic Soc.*, 4 Lans. 14.

⁷ *Hale v. Everett*, 53 N. H. 9; 16 Am. Rep. 82; *Worrell v. First Presb. Church*, 23 N. J. Eq. 96; *Cong. Beth.*

Elohim v. Cent. Presb. Church, 10 Abb. Pr., N. S., 484.

⁸ *Walrath v. Campbell*, 28 Mich. 111.

⁹ *Madison Avenue etc. Church v. Baptist Church*, 11 Abb. Pr., N. S., 132; 46 N. Y. 131; *Church of St. Bartholomew v. Wood*, 80 Pa. St. 219; *Sohier v. Trinity Church*, 109 Mass. 1; *Van Houten v. First Ref. Dutch Church*, 17 N. J. Eq. 126.

¹⁰ *Madison Av. etc. Church v. Baptist Church*, 9 Jones & S. 369; 73 N. Y. 82.

¹¹ *Madison Avenue etc. Church v. Baptist Church*, 11 Abb. Pr., N. S., 132; 46 N. Y. 131.

¹² *North St. Louis Church v. McGowan*, 62 Mo. 279, the court saying: "It has been contended that the corporation cannot maintain this action

society may sue on a contract made with them in their associate capacity, and for the legitimate purposes of their association, though no persons are named as trustees or committee-men.¹ A church may maintain an action to compel the treasurer of an unincorporated association—as a “sewing-circle”—to pay over money collected thereby for the church’s benefit.² Where a law provides that a religious association, by voluntarily associating and performing other acts, shall become a body corporate, the society, by performing such acts, obtains a corporate existence, and may maintain suit in that capacity;³ or be sued by a member upon a contract made by the authorized agents of the society.⁴ A society authorized by legislative act to meet, choose officers, and repair their meeting-house may sue for the destruction of the building after it was repaired.⁵ The seceding members of a chartered society, forming a new voluntary association, cannot maintain a suit for the recovery of debts due the corporation.⁶ By statute in Indiana, a church organization can sue only in the name of wardens and vestrymen or trustees of the church.⁷

A religious society may submit to arbitration its claim to a meeting-house disputed by another society.⁸ A religious society has the right to prescribe such rules as it

in its own name, and that if it is maintainable at all, it should have been brought in the name of the trustees. But this argument is founded upon an obvious error. Religious incorporations are aggregate corporations, and whatever property they possess or acquire is vested in the body corporate. It is true the officers have it under their control or dominion, but their possession is the possession of the artificial persons whose agents they are. Although called trustees, they do not hold the property in trust. Their right to intermeddle with or manage the property is an authority, and not an estate or title. They have no other or greater possession than the directors

of a bank in a banking establishment. The whole title or estate is vested in the incorporated body, and the corporation is the proper party to sue.”

¹ *Phipps v. Jones*, 20 Pa. St. 260; 59 Am. Dec. 708.

² *Franklindale Baptist Church v. Pryor*, 23 Hun, 271.

³ *Shelburne M. E. Soc. v. Lake*, 51 Vt. 353.

⁴ *Sawyer v. Society*, 18 Vt. 405.

⁵ *Tilden v. Metcalf*, 2 Day, 259.

⁶ *Smith v. Smith*, 3 Desaus. Eq. 557.

⁷ *Drumheller v. Church*, 45 Ind. 275.

⁸ *Curd v. Wallace*, 7 Dana, 190; 32 Am. Dec. 85.

thinks proper for preserving order during public worship.¹ Where a congregation was incorporated, and power given "to make rules, by-laws, and ordinances, and do everything needful for the good government and support of the congregation," it was held that the corporation had power to make a by-law vesting the appointment of inspectors of their elections in the president. So, also, that they had power to make a by-law prohibiting tickets from being counted at an election on which there were other things besides the names.² Where the charter of a church authorized the making of by-laws necessary for its good government, and directed that the election of the minister, wardens, and vestrymen should be conducted agreeably to certain rules, one of which was that no person should vote who had not been regularly admitted, and a member of the church for twelve months preceding the election, a by-law was valid which prohibited any person to vote whose pew-rent was in arrear more than two years.³ A church corporation has no power to contract for a steamboat excursion, to raise money for the church purposes, and cannot recover for expenses or loss of anticipated profits by reason of the defendant's breach of such contract.⁴ An order of the court at the petition of a majority

¹ In *McLain v. Mattock*, 7 Ind. 525, 65 Am. Dec. 746, the rule attacked was that males and females should sit apart; but the court sustained it.

² *Commonwealth v. Woelper*, 3 Serg. & R. 29; 8 Am. Dec. 628.

³ *Commonwealth v. Cain*, 5 Serg. & R. 510.

⁴ *Harriman v. First Bryan Baptist Church*, 63 Ga. 186; 36 Am. Rep. 117. The court said: "The erection of a church edifice appropriate to the congregation is certainly within this enumeration as well as within the general scope of the powers which should appertain to a religious society whether incorporated or unincorporated. And the same may be said of raising money to pay for the erection. This last was the purpose which moved the First Bryan Baptist

Church to undertake to conduct an excursion from Savannah to Beaufort, and to charter a steamer for the occasion; there was a debt outstanding, contracted for the erection of a new brick church, and the corporation wished to raise money with which to discharge it. The purpose was a worthy and laudable one, and, as we have said, was within the charter; but the power to raise money for a proper object does not carry with it unlimited discretion as to the means of raising it. Every corporation must act according to its nature; a trading corporation must trade; a manufacturing corporation must manufacture; a banking corporation must bank; a transportation corporation must carry; and a religious corporation must preach, teach, minister to spiritual edi-

of the members of a religious corporation for the sale of their real estate, and that the proceeds be invested in another place of worship, is not in violation of the trust imposed on the property to use it for religious purposes, and a good title can be conveyed.¹ A statute authorizing

fication, and promote works of mercy and benevolence. A church, incorporated as such, cannot engage, even for a day, in merchandising, or in spinning or weaving, or in banking or broking, or in transporting freight or passengers. It must derive its income, not from the conduct of any worldly business, but from such property as it may happen to own, and from voluntary contributions. However urgent its needs for money, it cannot rent a farm to make a crop of corn or cotton, nor a store to buy and sell goods, nor a livery-stable to let out horses or carriages, nor can it hire a vessel to transport the public upon rivers or the ocean. To charter a steamer and sell tickets to the public for an excursion is to enter into the responsibilities and hazards of a business for gain and profit not mentioned or hinted at in 'the more efficient worship of God, the preservation and perpetuation of said church, and the better control and regulation of the property thereof.' The adventure, it seems, required a considerable outlay of church revenue: \$260 for the vessel, and \$18.50 for the necessary printing, advertising, ice, and music. This capital was understood to be staked on the success of the 'committee' in selling tickets; but perhaps it was not thought of that each ticket sold would, if good for anything, amount to a contract on the part of the church to have the buyer transported to Beaufort and back, and that a breach of the contract would subject the church to an action on each and every ticket. What unseemly commotion actually arose on account of the failure of the expedition may be gathered from the evidence; a committee-man on board was threatened with a most profane form of immersion, two or three fights occurred, a man was knocked down with a stool, and one woman cut another with a razor. That church members in

their personal individual capacity have the right, if they think fit, to get up an excursion as matter of business, for the improvement of the church finances, to charter carriages, ships, or railroad trains for the purpose, and to sell tickets to the public, there is no doubt; but it seems to us that an artificial entity which the law creates under the name of a corporation can do nothing of the kind without the authority to do it is specially granted. We are looking at transactions that involve business dealings with the public, and not merely at an excursion undertaken by the congregation for devotional exercises, celebrations, or recreation. It may be that the corporate resources might be drawn upon for an excursion of this character, and the corporate functions of the church be enlisted in heading and conducting it. Possibly, also, it would be competent for a church as a corporation to hire a vessel to convey from place to place a company sent out to solicit contributions for the supply of its wants or to swell its exchequer. In this country, all support of religion being voluntary, there can be no question that solicitation is within the scope of the powers which every religious corporation enjoys. If a church in Savannah wanted to employ a vessel to carry a party over to Beaufort to collect funds by contribution, perhaps it might do so. The present case does not require us to settle this question. What was attempted was to conduct a day's carrying business with the public, and to employ a vessel for this purpose. The church was incorporated for no such end, and as means to the ends for which the corporation was created we think the enterprise was neither necessary nor appropriate. The contract was therefore *ultra vires*."

¹ In re First Presbyterian Church, 106 N. Y. 251.

a religious society to take and hold "subscriptions or contributions in money or otherwise" confers power to take by gift, but not the power to take by will.¹ A statute prohibiting a religious society from holding more than twenty acres applies to a single religious society, not to the denomination.²

ILLUSTRATIONS. — The G. congregation and the L. congregation entered into articles of association to build a church, in which "divine service" only should be held. For a period of twenty years, no other than meetings for public worship or preaching the gospel were held in the church. Sunday schools were not in existence in the neighborhood when the church was built. *Held*, that the G. congregation was entitled to an injunction restraining the L. congregation from holding a Sunday school in the church: *Gass's Appeal*, 73 Pa. St. 39; 13 Am. Rep. 726. Land was deeded to a Roman Catholic bishop, his successors and assigns, for the purpose of "erecting thereon a Roman Catholic church and other buildings pertaining thereto, or to be exchanged therefor, or used in the purchase of other property in the town." A church was built on part of the land. *Held*, that he might sell the rest for the purpose of paying a debt incurred in its erection: *Blanc v. Alsbury*, 63 Tex. 489; 51 Am. Rep. 666.

§ 613. **Liability for Services.** — A church society accepting the services of a sexton may become liable to him therefor;³ but it is otherwise if the evidence clearly shows that the performance of the duty was voluntary, and that it was supposed on both sides that his service was something he was spontaneously giving.⁴ So church music in small country villages or hamlets is usually gratuitous;⁵ and to authorize a recovery for services as an organist, an actual employment of the plaintiff by the defendant must be shown, and a promise, binding on the corporate body, to pay the plaintiff for the service.⁶ Church elders, or other parties, inviting, on behalf of a voluntary

¹ *Brown v. Thompkins*, 49 Md. 234.

⁴ *St. Jude's Church v. Denberg*, 31 Mich. 287.

³ *Morgan v. Leslie, Wright*, 144.

⁵ *Van Buren v. Ref. Church*, 62

Ill. 252.

⁶ *Barb.* 495.

⁴ *Id.*

and unincorporated association, a clergyman or other third person to perform services, are responsible for the services performed in pursuance thereof; this either as signers or as members.¹ Where the officiating priest of a church, who is a member and chairman of the board of trustees, employs a person to work for the church, without authority from the other trustees, and the act is not ratified by them, the church is not liable.²

ILLUSTRATIONS.—The pastor of a religious society got judgment against the trustees for his salary, and a levy was made on the church communion service. *Held*, invalid: *Lord v. Hardie*, 32 N. C. 241; 33 Am. Rep. 683. The defendants duly elected the plaintiff sexton of their church for the term of one year, at a fixed salary. The plaintiff entered upon his duties, and after nine months was discharged from his office against his will, and expelled from the society for an “alleged cause.” In an action for services rendered, the plaintiff having offered to perform, *held*, that as it did not appear that he must be a member in order to be sexton, nor what the nature of the “alleged cause” was, his expulsion from membership did not affect his legal rights as servant to defendants: *Stern v. Congregation Schaare Rachmin*, 2 Daly, 415.

§ 614. Trustees—Rights and Duties of—Other Officers.

—The trustees are the managing officers of a corporation, invested, as to the temporal affairs of the society, with the powers specifically conferred by law or by the statute organizing the corporation, and with the ordinary discretionary powers of officers of civil corporations.³ But in order to bind the corporate body, they must act as a board, and not individually.⁴ The trustees have the right to the possession of the property of the corporation, and this right will be protected by the courts.⁵ The trustees have power to bind the society by their contracts executed

¹ *Thompson v. Garrison*, 22 Kan. 765.

² *St. Patrick's R. C. Church v. Gavalon*, 82 Ill. 170; 25 Am. Rep. 305.

³ *Worrell v. First Presb. Church*, 23 N. J. Eq. 96; *Robertson v. Bullions*,

11 N. Y. 243; *Watkins v. Wilcox*, 4 Hun, 220; *Little v. Bailey*, 87 Ill. 239; *In re St. Ann's Church*, 23 How. 285; *Kulinski v. Dambrowski*, 29 Wis. 109.

⁴ *Constant v. Rector*, 4 Daly, 305.

⁵ *Boone on Corporations*, sec. 275.

jointly,¹ to hire persons to take charge of the church and grounds,² to sue for the recovery of the church building,³ to regulate the renting of pews,⁴ to preserve order in the church and remove disturbers,⁵ to defend, at the cost of the society, against legal proceedings endangering either the existence of the corporation or its rights of property,—for instance, an injunction forbidding the sale of its pews.⁶ A trustee may sue in the name of a corporation to restrain his co-trustees from diverting the property.⁷ Trustees of a church, in order to bind it, must act officially at official meetings, or under authority conferred by such meetings; and a lawful meeting is one duly called, and which all the trustees have at least constructive opportunity to attend.⁸ In the absence of evidence as to the manner in which a church makes contracts, but it appearing that there are trustees, of whom the officiating priest is the chairman, it will be presumed that they are empowered to bind the church by contract; but they must act jointly, delegate their power, or ratify the acts of one or more of them; and where the priest alone employed a sexton for the church, without authority from or ratification by the other trustees, it was held that the church was not liable for such employment.⁹ A contract with a board of trustees *de facto*, in possession, made by one having no knowledge of an illegality in their election, is binding on

¹ *St. Patrick's Church v. Gavalon*, 82 Ill. 170; 25 Am. Rep. 305; *Constant v. St. Albans Church*, 4 Daly, 305. The president and secretary of an incorporated religious society have not implied authority to bind the society by a promissory note: *Cattron v. First Univ. Soc.*, 46 Iowa, 106.

² *St. Patrick's Church v. Gavalon*, 82 Ill. 170; 25 Am. Rep. 305.

³ *First M. E. Church v. Filkins*, 3 Thomp. & O. 279. When, by by-law, a committee is empowered generally to manage the affairs of a religious society, expending only such money as the society shall place at its disposal, it is not empowered to employ

a lawyer to defend the society against a lawsuit: *Child v. Christian Society*, 144 Mass. 473.

⁴ *Solomon v. Cong. B'nai Jeshurun*, 49 How. Pr. 263.

⁵ *Beckett v. Lawrence*, 7 Abb. Pr., N. S., 403; *McLain v. Matlock*, 7 Ind. 525; 65 Am. Dec. 746; *Wall v. Lee*, 34 N. Y. 141.

⁶ *Harbison v. Hartford First Presb. Soc.*, 46 Conn. 529; 33 Am. Rep. 34.

⁷ *First Reformed Presb. Church v. Bowden*, 14 Abb. N. C. 356.

⁸ *Leonard v. Lent*, 43 Wis. 83.

⁹ *St. Patrick's Roman Catholic Church v. Gavalon*, 82 Ill. 170; 25 Am. Rep. 305.

the corporation.¹ And a mortgage executed by all the trustees, to secure a debt of the society, is binding on the corporation, without a formal resolution of the board.² The amount of debt which the trustees of a religious society may be authorized to create may be limited by its constitution.³ A church cannot be bound by the action of the trustees beyond the express powers granted by the members.⁴ The trustees cannot create a lien on its property without express authority.⁵ Where the trustees, acting in good faith and with reasonable prudence, make expenditures and disbursements for the erection of a house of worship, they should be allowed therefor, although such expenditures exceed the amount of the trust.⁶ A member of a congregational church, elected its treasurer, who invests the funds of the church in his individual name, holds them as a trustee for the church, and as such is subject to the jurisdiction of a court of equity.⁷ In general, the regularly constituted officers of a church society, acting in good faith, will be protected by law.⁸ The trustees of an unincorporated church have no right, in consequence of a removal of a part of the society, to appropriate any part of the funds, though raised by voluntary contribution, to the support of a minister for the sole benefit of those so removing.⁹ So where the trustees insist on maintaining a minister who has been deposed by the denomination for unsoundness in faith and doctrine, members of the society may invoke the aid of a court of equity in the premises.¹⁰ Under the statutes of New York, the trustees of a religious corporation have no authority to distribute the property of the society

¹ Ebaugh v. German Ref. Church, 3 E. D. Smith, 60.

² Manning v. Moscow Presb. Soc., 27 Barb. 52.

³ Wyncoop v. Congregational Society, 10 Iowa, 185.

⁴ Miller v. Church, 4 Phila. 48.

⁵ Trustees v. Atlanta, 76 Ga. 181.

⁶ Bradbury v. Buchmore, 117 Mass. 569.

⁷ Weld v. May, 9 Cush. 181.

⁸ Lucas v. Case, 9 Bush, 297.

⁹ Presbyterian Church v. Donnom, 1 Desau. Eq. 154.

¹⁰ Isham v. Fullager, 14 Abb. N. C. 363.

among the individual members, nor can such power be conferred on them by vote of a majority of the members and an order of the county court.¹

In England, church-wardens and overseers are not a complete body corporate, but are only empowered to accept, take, and hold in the nature of a body corporate.² Church-wardens are, however, a corporation for the purpose of the custody of the ornaments of the church;³ and they have a right of access to the church at proper seasons, but are not entitled to the custody of the keys of the church.⁴ If one church-warden orders repairs to the church without the knowledge of the other church-wardens, he is liable individually.⁵ If there is more than one church-warden they must join as co-plaintiffs in order to maintain a suit.⁶ The trustees must be elected in the manner prescribed by the rules and usages of the society;⁷ at least, in substantial compliance therewith, and after notice to the members of the time and place of the election.⁸ Irregularities in giving notice of the election of trustees, or even its omission, do not invalidate it, provided it is fairly conducted, and all the members are present.⁹ An election of vestrymen of an Episcopal parish, not held on the day required by the canon, and of which notice is not given during the usual divine service as required by the canon, but an earlier service, is void.¹⁰ It is not necessary that a majority of the members be present to constitute a corporate meeting of a religious society. Those present at a

¹ *Wheaton v. Gates*, 18 N. Y. 395.

² *Smith v. Adkins*, 8 Mees. & W. 362.

³ *Liddel v. Beall*, 14 Moore P. C. 1.

⁴ *Ritchings v. Cordingley*, L. R. 3 Ecc. 113.

⁵ *Northwaite v. Bennett*, 2 Crompt. & M. 316.

⁶ *Fry v. Treasure*, 2 Moore P. C. (N. S.) 539.

⁷ *McIlvaine v. Christ Church*, 8 Phila. 507; *Miller v. Eshbach*, 43 Md. 1; *First African Church v. Hillery*, 51

Cal. 155; *Nelson v. Benson*, 69 Ill. 27.

⁸ *People v. Peck*, 11 Wend. 604; 27 Am. Dec. 104.

⁹ *People v. Peck*, 11 Wend. 604; 27 Am. Dec. 104; *Madison Ave. Church v. Baptist Church*, 1 Sweeny, 118. A notice in the words, "to transact any other business that may legally come before the meeting," will not embrace the election of a minister: *Donner v. Bodowin Soc.*, S. C. Mass. 1889.

¹⁰ *Dahl v. Palache*, 68 Cal. 248.

regular meeting constitute a quorum, and a majority of them can pass a resolution. The presence of strangers does not vitiate the proceedings unless they voted, and their votes were necessary to carry the resolution.¹ Where a charter of a religious society enjoins the duty of annual elections of trustees, fixing the time at which they shall be held, but is silent as to the mode of conducting them, the corporation may provide by a by-law for the mode of their performance; but where no such by-law has been adopted, a long-established usage will govern.² The election, by hand vote, of officers of a religious society, in which each proprietor has a vote for every pew which he owns, cannot be objected to, upon the ground of the inherent difficulty of thus ascertaining the result, after the election has taken place and the result has been declared.³ An election of trustees of a Presbyterian church is void if made by those who do not contribute their just proportion to the necessary expenses of the church, according to their own engagements or the rules of the congregation.⁴ Where the majority of a church, pretending, contrary to the fact, that a portion of the trustees elected had resigned and refused to act, proceed to elect others in their place, without notice to the minority of the congregation, and such others wrongfully assume to act, the law furnishes an appropriate remedy against them by *quo warranto*, or by bill in equity to restrain their unlawful acts.⁵ If trustees are required to be members of the society, and withdraw therefrom after election, they thereby cease to be trustees.⁶ But if trustees are not required to be communing members, the exclusion of a person from communing membership, though it be rightful, does not disqualify him from holding office as trustee.⁷

¹ Madison Ave. Baptist Church v. Baptist Church, 2 Abb. Pr., N. S., 254.

² Juker v. Commonwealth, 20 Pa. St. 484.

³ Wardens etc. v. Pope, 8 Gray, 140.

⁴ State v. Crowell, 9 N. J. L. 391.

⁵ Nelson v. Benson, 69 Ill. 27.

⁶ Baptist Church v. Noe, 12 How. Pr. 497; Counitt v. Ref. Church, 4 Lans. 339.

⁷ Bouldin v. Alexander, 15 Wall. 131.

A sexton, charged with the duty of conducting funerals in a church building, may lawfully remove therefrom an undertaker, who, after being warned to desist and leave, persists in conducting a funeral there in violation of rules prescribed by the authorities of the church to prevent interference with other religious exercises.¹

ILLUSTRATIONS.—A standing committee of a religious society was empowered by a by-law to do certain things, "and generally to manage the business of the society, expending only such sums of money as the society shall place at their disposal." Held, that the committee could not employ counsel to defend a suit against the society: *Child v. Christian Society*, 144 Mass. 473.

§ 615. Membership—How Acquired and Lost.—Membership in a religious society may be acquired by stated attendance on divine worship therein, and contributing towards its support.² And the right of a member to vote at a corporate election depends on his membership in the particular society,³ and not on his connection with the denomination to which the society belongs.⁴ Under a statute providing that the electors of Episcopal churches shall consist "of all who shall have belonged to such church," it was held that the meaning of the word "belonged" was a mixed question of law and fact, which must in each case be left to the jury.⁵ One who withdraws from a religious society does not continue a member thereof simply because he holds the same religious faith and tenets with the members of that society.⁶ But it is not a withdrawal from membership in the society for members thereof to meet for worship or the transaction of church business in some other building than the church

¹ *Comm. v. Dougherty*, 107 Mass. 243.

² *People v. Tuthill*, 31 N. Y. 550. None are deemed parishioners in the Episcopal Church except those who receive communion in the parish, with the consent of the incumbent: *Groesbeeck v. Dunscomb*, 41 How. Pr. 302.

³ *Watkins v. Wilcox*, 4 Hun, 220; 6 Thomp. & C. 539; 66 N. Y. 654.

⁴ *Watkins v. Wilcox*, 4 Hun, 220; 6 Thomp. & C. 539; 65 N. Y. 654.

⁵ *People v. Keese*, 27 Hun, 483.

⁶ *Den v. Bolton*, 12 N. J. L. 206.

edifice of the society.¹ One who, being a contributor, etc., is, under the canons of the church of the New Jersey diocese, entitled to vote at parish meetings, is not affected as to such right by the vestry's resolution to receive no further contributions from him.² A letter by members of a religious congregation to the trustees, stating that they resigned their membership until a new reader should be elected, was held not a resignation, but an attempt to create a suspension of their membership until the happening of a certain event, when they should have the right to resume it.³ A religious association formed on the basis of a community of property, each member surrendering to the association the property that he owns, to be enjoyed in common by all, and agreeing to promote its interest by his labor and otherwise, in consideration that he is to receive religious instruction, etc., as well as support for himself and family, and that in case of his withdrawal from the association the value of his property is to be refunded to him, is not forbidden by law.⁴ A member of the society of Shakers is bound by his covenant with the society, whereby on becoming a member he stipulates never to make any claim for his services. Such a covenant exacted by the society of Shakers of its members is not void, and is not in violation of any constitutional right.⁵ An action will not lie by a member, against one disturbing him in his devotions, while at church, by loud noises, singing, and talking.⁶

¹ *Perry v. Tupper*, 74 N. C. 722; *Bouldin v. Alexander*, 15 Wall. 131. See, as to resignation of membership, *Marks v. Cong. Daruch Amuno*, 5 Daly, 8; *People v. Farrington*, 22 How. Pr. 234; *Jones v. Cary*, 6 Me. 448.

² *State v. Trinity Church*, 45 N. J. L. 230.

³ *Marks v. Congregation Daruch Amuno*, 5 Daly, 8.

⁴ *Schriber v. Rapp*, 5 Watts, 351; 30 Am. Dec. 327.

⁵ *Waite v. Merrill*, 4 Greenl. 102; 16 Am. Dec. 238.

⁶ *Owen v. Henman*, 1 Watts & S. 548; 37 Am. Dec. 481, the court saying: "The injury alleged is not the ground of an action. He claims no right in the building, or any pew in it, which has been invaded. There is no damage to his property, health, reputation, or person. He is disturbed in listening to a sermon by noises. Could an action be brought by every person whose mind or feelings were disturbed in listening to a discourse or any other mental exercise (and it must be the same whether in

ILLUSTRATIONS.—The legislature incorporated certain persons, "with their families," into a religious society. *Held*, that the minor sons, as members of the father's family, became members of the corporation, and continued such, after arriving at full age, until they changed their membership in some mode provided by statute: *Bradford v. Cary*, 5 Me. 339. The charter of a German Lutheran congregation conferred the right of voting on the "contributing members being communicants." A subsequent statute confirming the charter, with some alterations, declared that no person should be entitled to vote who was under the age of eighteen years. *Held*, that to entitle a member of the congregation to vote, it was not necessary that he should have taken the sacrament after the age of eighteen years: *Weckerly v. Geyer*, 11 Serg. & R. 35.

§ 616. Expulsion of Members.—The courts will inquire into the legality of the expulsion of a member.¹ But where it is done according to the rules of the society, and no property interest is affected, they will not

a church or elsewhere), by the noises, voluntary or involuntary, of others, the field of litigation would be extended beyond endurance. The injury, moreover, is not of a temporal nature: it is altogether of a spiritual character, for which no action at law lies. It is settled that an action on the case does not lie when there is not any temporal damage, as against a woman who pretends herself single, and inveigles a man into a marriage, whereby he is disturbed in conscience: 1 Com. Dig. 180; 1 Lev. 247. Nor does it lie for refusing to administer the sacrament: 1 Sid. 34. Nor for not reading divine service to him and the tenants of his manor: 1 Sid. 34; 5 Coke, 73 a. In 5 Barn. & Ald. 356, 7 Eng. Com. L. 129, it was decided that an action will not lie for disturbing the plaintiff in the occupation of a seat in the body of a church, though he had contributed to the making of the seats. Indeed, it is well known that the property of our churches and meeting-houses, and the superintendence of the congregations and the rights to control and regulate them, and to prevent improper intrusion or interference by suit or otherwise, is uniformly vested in some corporation or trustees in whom is placed the power to en-

force the conditions of the founder or the will of the owners. It is for them, or the organized officers, to bring actions of trespass, or on the case, to regulate the affairs of the churches, and to protect the members in the enjoyment of their religious rights and property. In addition, any persons disturbing congregations are liable to indictment by the act of the 2d of April, 1822. The injury complained of, if against the will of the officers of the church, is in the nature of a nuisance or injury to them, and it is for them to seek redress. Another objection to this action, springing out of similar causes, is, that if the plaintiff may maintain such an action, so may every member of the congregation present, whether males or females, adults or minors, and even sojourners attending, according to common usage. In *Williams's Case*, 5 Coke, 73, the plaintiff sued a clergyman for not performing divine service, as he was bound to do, to the plaintiff, his servants and the tenants within the manor. It was held the action would not lie; for if it did, every of his tenants might also have his action on the case, and so infinite actions for one default."

¹ *Bouldin v. Alexander*, 15 Wall. 131.

interfere to reinstate him.¹ But no member may be expelled without a hearing.² A member of a religious society which owns property in common, who has been wrongfully expelled, may sue in equity to compel an accounting and the recovery of his share.³ A *mandamus* will not lie to compel a religious society to restore to membership one who had been expelled by a decree of the legally constituted church judicatory, on account of an alleged violation of some law of the society; and the ground that such restoration is necessary to enable him to enjoy the right of sepulture acquired by him as a member is premature.⁴ No action will lie against the trustees of the society or corporation for expulsion from the church organization.⁵ Nor are the members of the

¹ *Sale v. First Baptist Church*, 62 Iowa, 26; 49 Am. Rep. 136.

² *Gray v. Christian Soc.*, 137 Mass. 329; 60 Am. Rep. 310.

³ *Nachtrieb v. Harmony Settlement*, 3 Wall. Jr. 66; *Lenux v. Harmony Settlement*, 3 Wall. Jr. 87.

⁴ *State v. Hebrew Congregation "Dispersed of Judah,"* 30 La. Ann. 205; 33 Am. Rep. 217.

⁵ *Hardin v. Trustees*, 51 Mich. 137; 47 Am. Rep. 555, the court saying: "The associates are not necessarily professors of any particular faith or belief, or members of any church; and corporate succession is kept up by conferring the privileges of corporators on all who regularly attend worship in the society and contribute to its support. And the trustees who are to manage the temporal affairs of the corporation may or may not be church members. Connected with the corporation the statute contemplates that there will be a church, though possibly this may not be essential. In this case there is one. The church has its members, who are supposed to hold certain beliefs, and subscribe some covenant with each other if such is the usage of the denomination to which the church is attached. The church is not incorporated, and has nothing whatever to do with the temporalities. It does not control the property or the trustees; it can receive nobody into the society,

and can expel nobody from it. On the other hand, the corporation has nothing to do with the church except as it provides for the church wants. It cannot alter the church faith or covenant, it cannot receive members, it cannot expel members, it cannot prevent the church receiving or expelling whomsoever that body shall see fit to receive or expel. This concise statement is amply sufficient to show that this suit has no foundation. The corporation is sued for a tort, which it neither committed nor had the power to prevent, and which has occurred in a proceeding where the interference of the corporation would have been an impertinence. But it is said that the church is an integral part of a corporation, or rather, that it is the corporation in its spiritual capacity. Its being an integral part of the corporation proves nothing. Counties, towns, and school districts are integral parts of the state, but the state is not for that reason liable for their torts. And as to spiritual capacity, the corporation has none; it is given capacity in respect to temporalities only. If the corporation had assumed to expel this plaintiff from the church, she might treat its action with contempt. But as she makes no complaint of wrongful corporate action, we must assume that the corporation has never invaded her rights. If the

session of the Presbyterian Church liable to an action for libel for expelling a person from membership in the church for alleged falsehood.¹

§ 617. **Divisions or Schisms—Right to Property.**—On the division of a congregation, or in case of disputes between two factions in a church causing a separation, the courts are sometimes called on to settle the status of the property of the society. In such case, where the property has not been impressed with any special trust at the time it was acquired, the title to the property of a divided congregation is held to be in that part which is acting in harmony with the laws of the society and the church.² The words "schism or division," in a statute providing that in case of such an occurrence each party is to have the use of the church and appurtenances a part of the time in proportion to its members, mean a division of the society on account of differences among themselves, and not to a difference of faith, or the withdrawal of part of the congregation and their attaching themselves to an-

church has done so, the church alone is culprit. The distinction between church and corporation in these cases is sufficiently explained in the following authorities: *Baptist Church v. Witherell*, 3 Paige, 296; 24 Am. Dec. 223; *Lawyer v. Cipperly*, 7 Paige, 281; *Robertson v. Bullions*, 11 N. Y. 243; *Bellport v. Tooker*, 29 Barb. 256; 21 N. Y. 267; *Burril v. Church*, 44 Barb. 282; *Miller v. Gable*, 2 Denio, 492; *Ferraria v. Vasconcellos*, 31 Ill. 25; *Calkins v. Cheney*, 92 Ill. 463; *Keyser v. Stansifer*, 6 Ohio, 363; *Shannon v. Frost*, 3 B. Mon. 253; *German Cong. v. Pressler*, 17 La. Ann. 127; *O'Hara v. Stack*, 90 Pa. St. 477; *Sohier v. Church*, 109 Mass. 1; *Walwath v. Campbell*, 28 Mich. 111. See also *Hale v. Everett*, 53 N. H. 9; 16 Am. Rep. 82."

¹ *Landis v. Campbell*, 79 Mo. 433; 49 Am. Rep. 239.

² *Roshi's Appeal*, 69 Pa. St. 412; 8 Am. Rep. 275; *McGinnis v. Watson*, 41 Pa. St. 9; *Lewis v. Watson*, 4 Bush,

228; *Ferraria v. Vasconcelles*, 23 Ill. 456; *Bouldin v. Alexander*, 15 Wall. 131; *Trustees v. Seaford*, 1 Dev. Eq. 453; *App v. Lutheran Soc.*, 6 Pa. St. 201; *Trustees v. Sturgeon*, 9 Pa. St. 321; *Landis's Appeal*, 102 Pa. St. 467; *Gass v. Wilhite*, 2 Dana, 170; 26 Am. Dec. 447; *Schnorr's Appeal*, 67 Pa. St. 138; 5 Am. Rep. 415. In New York the majority seems to govern: See *Petty v. Tooker*, 21 N. Y. 267; *Gram v. Prussia German Soc.*, 36 N. Y. 161; *Robertson v. Bullions*, 11 N. Y. 243; *Burrel v. Associate Reformed Church*, 44 Barb. 282; *Ebbinghaus v. Killeen*, 1 Mackey, 247; *Brown v. Moore*, 80 Ky. 443; *Isham v. Dewkirk*, 63 How. Pr. 465; *Louisville First Presb. Church v. Wilson*, 14 Bush, 252; *Ramsey's Appeal*, 88 Pa. St. 60; *Kerr's Appeal*, 89 Pa. St. 97; *Hoskinson v. Pusey*, 32 Gratt. 423; *Venable v. Ebenezer Baptist Church*, 25 Kan. 177.

other church.¹ Where property has been dedicated by way of trust to the support of a specific religious belief, it is the duty of the court to see that the property so dedicated is not diverted from this purpose.² A severance of the connection of a church belonging to an ecclesiastical organization with a certain form of belief and church government is a violation of the trust on which its property is held, and a diversion of it to a wrongful use which a court of equity will prevent.³ Where a trust

¹ *McKinney v. Griggs*, 5 Bush, 401; 96 Am. Dec. 360.

² *Watson v. Jones*, 13 Wall. 679; *Schnorr's Appeal*, 67 Pa. St. 138; 5 Am. Rep. 415; *Swedesborough Church v. Shivers*, 16 N. J. Eq. 453; *Attorney-Gen. v. Dublin*, 38 N. H. 459; *Kinthead v. McKee*, 8 Bush, 535; *Ass. Ref. Church v. Theolog. Sem.*, 4 N. J. Eq. 77; *Winebrenner v. Colder*, 43 Pa. St. 244; *Trexler v. Mennig*, 33 Leg. Int. 677. In a recent case (*Amish v. Gelhaus*, 71 Iowa, 170) the court say: "Counsel for appellants insist that, under the laws and rules of the Roman Catholic Church, the bishop of the diocese, and the priest of the parish under the direction of the bishop, are invested with the absolute control of the funds and the property of the church, and the laity have no right to interfere with such control. If this fund had been raised for the general purposes of the church, and paid to the priest without any obligation upon him to apply it to a specific purpose, the position of counsel might be correct. But it is conceded that the money was raised for a special purpose. This being so, it passed into the hands of the priest as a trust fund. It did not vest absolutely in either bishop or priest to be disposed of as they might think for the best interest of the church."

³ *Jones v. Wadsworth*, 33 Leg. Int. 390; 11 Phila. 227 (affirmed by the supreme court, 4 W. N. Cas. 514), the court saying: "The property of a religious society is held upon a trust, the terms of which are declared in the doctrines of religious belief upheld by the society, and in case of a congregation constituted as above described, its connection with the larger organization, of

which it is a part, is one of these fundamental doctrines. An illegal severance of this connection is a violation of these fundamental doctrines, and therefore constitutes a diversion of the property to a wrongful use, to prevent which a court of equity will interpose on application of a party in interest. This doctrine was first clearly and broadly asserted by Lord Eldon in the leading case of *Attorney-General v. Pearson*, 3 Mer. 409. He considered the principles as having been settled by the house of lords upon appeal, in which a case had arisen in Scotland. His exposition of the law has been the light by which courts have been guided in the determination of all similar cases, from that to the present day. He says it is clearly settled that if a fund, real or personal, be given in such a way that the purpose be clearly expressed to be that of maintaining a society of Protestant Dissenters, promoting no doctrine contrary to law, it is the duty of this court (the court of chancery) to carry such a trust as that into execution, and to administer it according to the intent of the founders. He adds: 'I agree that religious belief is irrelevant to the matter in dispute, except so far as the king's court is called on to execute the trust.' This case is cited with approval by Chief Justice Nelson in *Field v. Field*, 9 Wend. 401; and in *Miller v. Gable*, 2 Denio, 510, Vice-Chancellor Hoffman says: 'I think, in sound reasoning, supported by authority, there is a distinction between the dedication of property to support particular tenets, and its dedication to support such tenets in subjection to a particular church government. There

is created for the benefit of an incorporated religious society, and there are two bodies, each claiming to be such

may be a support of tenets without subjection to any ecclesiastical power which upholds them; but it may be a condition of a grant of property that a trust is to be maintained in subordination to a particular power, as if a church be established in connection with a particular ecclesiastical body, a severance from that body would be a violation of the trust.' This case was affirmed by the court of errors on appeal. So, also, in our own state, we have a number of cases affirming the same doctrine. In the case of the Presbyterian Church v. Johnson, 1 Watts & S. 37, in the opinion of the majority of the court by Gibson, C. J., there is the concession of the principle, though holding that it did not apply to the case before the court, because no such condition as union with a particular Presbyterian connection was prescribed by the founder or was made a condition of the grant, the grant being to 'The Society of English Presbyterians Worshipping in the Borough of York.' The chief justice remarks: 'I concede also that subjection to a particular judicatory may be made a fundamental condition of the grant. Even without an express condition, it might be a breach of the compact of association for a majority of the congregation to go over to a sect of a different denomination, though it were different only in name. A congregation of seceders could not carry the church property into the Presbyterian connection, though these two sects have the same standards and plan of government.' This case is sometimes cited as supporting one of the positions that a substantial agreement in doctrine and form of church government will justify a transfer of ecclesiastical connection from one kindred body to another, and along with such change of relations to carry the property of the congregation into the new connection. But the statement of the chief justice shows how far the majority of the court were from entertaining any such view of the law, and that in the assertion of a contrary doctrine they were in entire accord with the minority

of the court, as expressed in the dissenting opinion of justices Kennedy and Houston. The members of the court differed on the material point which ruled the cause, whether a particular Presbyterian connection had been made a condition of the grant. The majority held that it had not, because no general assembly was in existence when the lot was donated, and because a severance of the body into two nearly equal parts, each claiming to be the true general assembly, and both adhering to the same standards of faith and form of church government, was a contingency not contemplated by the donors. This case is of the class referred to by the vice-chancellor in *Miller v. Cable*, where property has been dedicated to support particular tenets and general form of church order, but where it is no part of the condition that it shall be enjoyed in subordination to any particular church government. The case of *Means v. Presbyterian Church*, 3 Watts & S. 303, is in substance an affirmation of the statement of Chief Justice Gibson in *Johnson v. Presbyterian Church*, that subjection to a particular judicatory may be made a fundamental condition of a grant, that a congregation of seceders could not carry the church property into the Presbyterian connection. The grant was in trust for the Associate Reformed Presbyterian Church of Shippensburg. The point decided is, that the property could not be enjoyed by a congregation of Presbyterians, members of the Presbyterian Church, under the government of the general assembly; the Associate Reformed Presbyterian Church, and the Presbyterian Church in the United States of America, though substantially one in faith, and each being Presbyterian in government, were separate and distinct bodies. A grant of property to one did not justify a use of church property in connection with the other organization. It was contended there, as it is contended here, that the designation of the *cestui que trust* is not strictly applicable to one of these denominations more than to the other,

society, a court of equity may require the claimants to interplead, and may proceed to ascertain the true beneficiary, without compelling either party to establish its corporate rights at law.¹ A fund created by a religious society for the education of children in the faith and doctrines of the society, as professed when the fund was created, cannot be diverted from its original object; and if a diversion is made or attempted, a court of equity will interpose.²

In order to ascertain which of the divisions of the church adheres to the faith which the donor desired by his gift to sustain, it will be proper for the court to inquire into questions of religious belief and practice.³ So the religious tenets of a donor in trust to a religious corporation may be shown, as well as other circumstances, to aid in the construction of ambiguous provisions.⁴ If each of the two divisions adheres to such faith, so that the administration of the property by either would be an execution of the trust on which it was given, the property should be shared between them, in proportion to their numbers at the time of the division.⁵ Where the majority of a particular church form a union with another body holding substantially the same doctrines, the congregation adhering thereto do not forfeit their right to the church property in favor of a dissenting minority.⁶ Where the constitution of a religious corporation provides that congregation and pastor shall join some synod, and the pastor withdraws from the synod to which both have

because they are substantially the same; but it was held to be otherwise, and that a connection with a particular ecclesiastical government was an essential condition on which the property was to be enjoyed. The same principle is maintained in *App v. Lutheran Congregation*, 6 Pa. St. 209, the intention of the donor as to ecclesiastical connection being maintained by the court. *Trustees v. Sturgeon*, 9 Pa. St. 321, holds to the same view of

the law." And see *Presbyterian Church v. Johnson*, 1 Watts & S. 212.

¹ *First Presbyterian Society v. First Presbyterian Society*, 25 Ohio St. 128.

² *Field v. Field*, 9 Wend. 394.

³ *Hale v. Everett*, 53 N. H. 9; 16 Am. Rep. 82.

⁴ *Robertson v. Bullions*, 11 N. Y. 243.

⁵ *Nicolls v. Rugg*, 47 Ill. 47.

⁶ *Ramsey's Appeal*, 88 Pa. St. 60.

belonged, and with which a majority of the congregation vote to remain, the majority have a right to control the church property.¹ Wrongful seizure of property of a church having a congregational form of government, by a minority of the members, against the wishes of the majority, and retention thereof, is a ground for equitable relief. A few may represent others having a common interest.² Where the old or regular body of a religious association, who are in possession of the title and control of the church property, permit a body of separatists to use the church building on certain days for the purposes of worship and instruction, no length of time will operate to vest any title in said separatists as tenants in common with the old or regular body.³ The trustees of an unincorporated independent church congregation, in whom the title to the church property is vested for the use of the congregation, may maintain ejectment against a portion of the congregation who seceded, formed a separate organization, and took possession of the church property.⁴

ILLUSTRATIONS.—Certain persons organized themselves under a general statute into a corporation as a "Unitarian Society of Christians," and continued to hold property and conduct public worship as such until the pastor publicly avowed that he was "neither a Unitarian nor a Christian." Thereupon a majority of the members of said society formed a new society and re-employed said pastor. He continued to preach his own doctrines in the meeting-house of the society, and was supported by a majority of the society. The minority filed a bill against the majority and the pastor, praying an injunction to restrain the preaching of such doctrines in the meeting-house. *Held*, that they were entitled to the injunction: *Hale v. Everett*, 53 N. H. 9; 16 Am. Rep. 82. Certain persons contributed a fund to build a church at Cape May, creating a trust by which the title was to be held by Presbyterians, but the church was to be kept open during the bathing season for Christians of all denominations. The title was thereafter passed to Methodists, who held it nearly for the exclusive use of Methodists. *Held*, that the contributors were interested, as *cestuis que trust*, in the trust,

¹ *Dressen v. Brameier*, 56 Iowa, 756.

² *Bates v. Houston*, 66 Ga. 198.

³ *Landis's Appeal*, 102 Pa. St. 467.

⁴ *Fernstler v. Seibert*, 114 Pa. St. 196.

and having been deprived in a measure of their privilege of worship, might maintain their bill for protection: *Ludlam v. Higbee*, 11 N. J. Eq. 342. Property was purchased by a religious society incorporated under the laws of Illinois, and paid for by voluntary contributions of the members, and it was agreed at the time, between all the members, that the property should be held by the trustees for the common use and benefit of the members, and in case of a schism or division for any cause, there should be a fair division of the same in proportion to their members, and a similar provision was adopted in their constitution. *Held*, that by the term "schism" was meant a division or separation of the members of the body occasioned by a diversity of opinion on religious subjects, and that a difficulty growing out of an illegal election of trustees by a majority, and their excluding the minority from the use of the church, was not a schism to justify a court in decreeing a division of the property: *Nelson v. Benson*, 69 Ill. 27. A fund was bequeathed to an ecclesiastical society, the interest of which was to be applied for the purpose of maintaining a free school in one of the districts. *Held*, that an agreement by the society to apply the fund to the support of the ministry was void, being a fraud on third persons: *Bailey v. Lewis*, 3 Day, 450. A testator bequeathed "to the Lutheran congregation in S. the sum of four hundred dollars," to be invested "for the use of said congregation forever," there being at the time (1815) but one Lutheran congregation in S., and there continued to be but that one until 1843, when a majority of the vestry (the trustees) and of the members left the church, with the pastor, and built a new church; the old church continued to belong to the same synod as in 1815, and the new church to another, which synods did not recognize each other. Both churches called themselves the Lutheran congregation of S. *Held*, that the old church was entitled to the fund: *App v. Lutheran Congregation*, 6 Pa. St. 201. Land was conveyed to certain persons named, "as one entire property, never to be divided or severed, for the use of the First Baptist Society in K., to be forever kept for the sole use and support of a minister of the Baptist denomination." At the time there was a society of that name, but it had never been legally organized as a parish. This society became afterwards divided, and each division assumed the same name, and organized under the statute, claiming to be the same society. *Held*, that they were both new societies, and that neither was intended by the grant, or entitled to the benefit thereof. *Cox v. Walker*, 26 Me. 504. Certain members of a church were expelled, and formed a new society, which made an arrangement with the old society for the ultimate use of the meeting-house, and the new society was afterwards dissolved by its own acts. *Held*, that

the members of the new society, after its dissolution, had no rights or claims under the arrangement, and they were enjoined against disturbing the old society in the use of the meeting-house: *Berryman v. Reese*, 11 B. Mon. 287. A Lutheran congregation, which had always been independent in matters of doctrine, had for many years been in the habit of sending delegates to the district synod, subject to the general synod of the Lutheran Church. Differences arose in the Lutheran body, and a general council was formed in opposition to the general synod. The district synod then gave in its adherence to the general council, the congregation aforesaid continuing to send delegates to the district synod. The church council subsequently elected a pastor who held to the general synod. *Held*, that he should not be restrained from acting as pastor or from using the church property, his doctrines being distinctively Lutheran, and the congregation always having been independent in matter of doctrine: *Ehrenfeldt's Appeal*, 101 Pa. St. 186.

§ 618. **Pews.**—In the United States, the owners of pews in a church or meeting-house belonging to a religious society have only an easement in the freehold.¹ It is an exclusive right to occupy a certain part of the church or meeting-house for the purpose of attending upon public worship, and for no other purpose.² And the right is subordinate to the power of the aggregate body to remodel the building or to abandon it, or to sell it as an entirety, on deciding to remove.³ “In no case,” it is said in

¹ *Abernethy v. Church of Puritans*, 3 Daly, 1; *St. Paul's Church v. Ford*, 34 Barb. 16; *Sohier v. Trinity Church*, 109 Mass. 1; *Perrin v. Granger*, 33 Vt. 101; *Union Meeting House v. Rowell*, 66 Me. 400; *Woodworth v. Payne*, 74 N. Y. 200; 30 Am. Rep. 298. Pews are considered personal property in Pennsylvania: *Church v. Wells*, 24 Pa. St. 249. That, as between heir and executor, a pew is realty: *Succession of Gamble*, 23 La. Ann. 9; *Bates v. Sparrell*, 10 Mass. 323; *St. Paul's Church v. Ford*, 34 Barb. 16; *Gay v. Baker*, 17 Mass. 435; 9 Am. Dec. 159; *First Bapt. Ch. v. Bigelow*, 16 Wend. 28; *Kellogg v. Dickinson*, 18 Vt. 266; *Hodges v. Green*, 23 Vt. 358. The interest in a pew is separate from the fee, and may be leased and held distinct from the fee: *Woodworth v.*

Payne, 74 N. Y. 196; 30 Am. Rep. 298.

² *Daniel v. Wood*, 1 Pick. 102; 11 Am. Dec. 151; *Union Meeting House v. Rowell*, 66 Me. 400; *First Baptist Soc. v. Grant*, 59 Me. 245; *White v. M. E. Church*, 3 Lans. 477; *First Baptist Church v. Witherell*, 3 Paige, 296; 24 Am. Dec. 223.

³ *Voohees v. Presb. Church*, 8 Barb. 135; *Van Houten v. Reformed Dutch Church*, 17 N. J. Eq. 126; *Sohier v. Trinity Church*, 109 Mass. 1; *Kellogg v. Dickinson*, 18 Vt. 273; *Erwin v. Hurd*, 13 Abb. N. C. 91. In *Church v. Wells*, 24 Pa. St. 249, the court say: “In England the right to a pew in a church is obtained by a faculty or grant from the ordinary, or by allotment by the minister or churchwardens, or by prescription. In the

Massachusetts, "can be found any intimation that a religious society would subject themselves to any liability to the pew-holders in consequence of abandoning their meet-

last case the right is appurtenant to a dwelling-house, and in the others it is merely personal, and not transferable or descendible. Pew rights here depend upon no such principles, and this, without considering the relation of the English church to the state, shows that the English law relating to pews can have no general application here. Religious congregations here are all voluntary associations, and are each governed by rules of their own, and not by the general laws of the state. But since there must be a supreme authority somewhere to preside over all interests, and that authority must be the state, it must necessarily exercise its control sometimes even in matters pertaining to the church; but then it generally takes the law and customs of the church as its guide, just as between individuals it takes their contracts and usages, and only for want of them resorts to the general laws and customs of the land. So it must be in relation to pews in a church. There not appearing to be any special law or custom in relation to pews in this congregation, we must look to the general customs of the country concerning them. A pew right is not of such a character as to prevent an absolute sale of the church edifice, either by contract or by judicial process; by itself it was never known as a subject of taxation; if the edifice burns down the pew right is gone; it does not prevent the society from tearing down and rebuilding the edifice, or from altering the whole interior arrangement of it; it does not authorize the pew-holder to change and decorate the pew according to his fancy, or to cut it down and carry it away; and it gives him no right to the ground on which it stands. It is, therefore, a right that is entirely peculiar, and yet it is a sort of interest in real estate. It is intended to be enjoyed by persons of a special form of belief relative to certain Christian doctrines and rites, and it cannot reasonably be enjoyed by others of a different belief. As to its enjoyment, therefore, it cannot be transferred or transmitted generally, though it may

be as to title if the rules of the congregation do not provide differently. It is in its nature scarcely divisible among heirs, and can scarcely be said to be the subject of an action of partition or ejectment, or of decree of sale by the orphans' court for the payment of debts. As property, therefore, it is so conditional and impermanent that it cannot be called real estate, and it must necessarily pass to the personal representatives. But in its very nature it could not pass to them for use, for they do not succeed to the opinions of the decedent. It passes merely for sale as part of the assets, and they sell it subject to its burdens. If the sale is not needed for creditors, the family may be allowed to hold it together; and if they do so, there is no one to charge the executors with a *devastavit* in not selling it. A pew rent is not a rent in the usual legal application of the term, for it does not issue out of a corporeal hereditament, and it is therefore no charge upon the property, except by virtue of the very ordinary provision made by congregations in such cases, and made in this instance, that the pew may be sold for arrears of rent. That is a sufficient remedy for arrears that may accrue after the owner's death, and it is not necessary or reasonable to imply a promise that his executors shall continue to pay after his death. He was personally bound for no rent except according to his contract; and that being undefined in the writing must be defined by the aid of the consideration. For the enjoyment of the religious institutions of that church and for that sitting to obtain the benefit of them, he engages to pay a certain annual sum called rent. It is impossible to suppose that either party intended the promise to endure beyond the contemplated advantages. There can be no recovery for the rent accruing after his death, except so far as it can be obtained by the remedy provided by the church itself in the sale of the pew, or by a resort to those who actually occupied it."

ing-house as a place of public worship, although the pews may thereby be rendered useless. The law is the same if public worship should be wholly discontinued, either in the meeting-house or elsewhere, by reason of the inability of the parish to maintain public worship, and to pay the necessary expenses of repairing the meeting-house, whether this inability be caused by the reduction of the numbers of the parishoners or otherwise."¹ Therefore, although a congregation cannot destroy a pew right for the purpose merely of taste or change without making compensation, if the building has become unfit for use, they may pull it down and erect a new building, in which event the holder loses his right without claim for compensation, for it is necessarily limited in its nature during the time when the building is used by the congregation for the purposes of divine worship.² So where the trustees of a church, in the exercise of a reasonable discretion, on account of dilapidation and the necessity for repairs, took out the floors and slips and other fixtures of the church, and reconstructed the inside of the edifice, it was held that the owners of the pews thereby lost their title to them, and had no remedy against the church in regard to the other pews put in to replace them.³ The pew-

¹ *Fassett v. First Presbyterian Church*, 19 Pick. 361.

² *In re St. Mary Magdalene*, 2 Mod. 222; *Attorney-General v. Federal*, 3 Gray, 1; *In re New South Meeting-house*, 13 Allen, 497; *Voorhees v. Presbyterian*, 17 Barb. 103; *Gay v. Baker*, 17 Mass. 434; 9 Am. Dec. 159; *Howe v. Stevens*, 47 Vt. 262; *Wentworth v. First Parish*, 3 Pick. 346; *Howard v. First Parish*, 7 Pick. 138.

³ *White v. First Society*, 3 Lans. 478, the court saying: "The right of pew-holders has always been held to be a qualified estate, a mere usufruct, subject to the more general right of the corporation in the soil and freehold. It is a right to occupy the pew purchased so long as it remains, or to the limit of the term of purchase; but it is subject, nevertheless, to the su-

perior right of the corporation to make necessary changes and repairs, and if the pew is removed the title is gone, without recourse to the holder." So in a Massachusetts case it is said: "It may be asked, what remedy is there for a minority of pew-holders, if the majority shall determine to demolish the building, and thus destroy the pews. We answer, none, if the act is necessary or proper. . . . If, on the other hand, there should be wanton or malicious abuse of power, . . . the laws will give a remedy to the extent of the injury received": *Wentworth v. First Parish*, 3 Pick. 346. But in *Gay v. Baker*, 17 Mass. 435, 9 Am. Dec. 159, compensation to the owner is said to be due, and this is secured in Massachusetts by statute: See *Sohier v. Trinity Church*, 109 Mass. 21; *Daniel*

holder as such has no interest in the freehold of the church or ground on which it is erected. The title thereto is vested in the corporation or trustees of the parish. Each pew-holder has a property only in his particular pew, which consists of a right to its exclusive occupation and enjoyment.¹ The sale of a pew in a church for an unlimited period is a sale of an interest in real estate, and must be in writing under the statute of frauds;² but a sale of pews is held not to be a sale of real estate within a statute requiring the sanction of the court to a sale of real property of a religious society.³ The estate of the holder in the pew may be for years, for life, or in fee, and may be held in consideration of a fixed sum, or periodical payments or assessments, certain or uncertain. The deed or contract by which the pew is held is the sole criterion of the nature and extent of the estate.⁴ Trespass lies for disturbing the owner of a pew in its possession;⁵ even against the society or person in whom the title to the land and building is vested;⁶ but not for the mere breaking and entry of the edifice in which the pew is situated.⁷ Where neither claimant to a pew has any legal title thereto, the one in possession will not be disturbed.⁸ Where, with the assent of a religious society owning a meeting-house, repairs and alterations changing the location of the pews are made by the pew-holders, an equitable assignment of the new pews among the pew-holders by a committee of the pew-holders, acting with

v. Wood, 1 Pick. 102; 11 Am. Dec. 151. And see *Jones v. Towne*, 59 N. H. 462; 42 Am. Rep. 602.

¹ *First Baptist Church v. Grant*, 59 Mo. 250; *Voorhees v. Presbyterian Church*, 17 Barb. 103.

² *Trustees v. Bigelow*, 16 Wend. 28; *Vielie v. Osgood*, 8 Barb. 130.

³ *Freligh v. Pratt*, 5 Cow. 494.

⁴ *Abernethy v. Society*, 3 Daly, 4; *First Methodist Church v. Brayton*, 9 Allen, 249.

⁵ *Shaw v. Beveridge*, 3 Hill, 26; 38

Am. Dec. 616; *Woodworth v. Payne*, 74 N. Y. 196; 30 Am. Rep. 298; *Sargent v. Pierce*, 2 Met. 80; *Jackson v. Grundel*, 5 Met. 127; *Gay v. Baker*, 17 Mass. 435; 9 Am. Dec. 159; *First Baptist Church v. Witherell*, 3 Paige, 296; 24 Am. Dec. 223.

⁶ *O'Hear v. De Goesbriand*, 33 Vt. 593; 80 Am. Dec. 653.

⁷ *Howe v. Stevens*, 47 Vt. 262.

⁸ *Montgomery v. Johnson*, 9 How. Pr. 232; *Brett v. Mullarkey*, 7 I. R. C. L. 120.

their implied assent, and in pursuance of a vote of the society, is valid.¹

The pew-holder cannot convert his pew to purposes not contemplated therein, nor so use his own as to interfere with the enjoyment of other pew-holders. Therefore, the officers of the church will not be trespassers for removing from a pew obstructions which interfere with the equal enjoyment by others of their pews.² A member of a religious corporation is not liable for pew rents where intruders, without authority from the charter or the law, take possession of the church, expel the vestry, and choose a new one, although such member retains his pew, but refuses to occupy it.³ Executors of a pew-owner are not bound to pay pew rent accruing after the owner's death. The remedy of the church in such case is by sale of the pew.⁴ The right to a pew can be transferred only in the manner provided for transfer of realty. The levy of an execution upon a pew as realty transfers title as against a prior assignment of a certificate of ownership thereof, recorded by the clerk of the society occupying the church, in accordance with the by-laws of the society, which provided for a transfer of pews in this way.⁵ The minister and trustees of a voluntary organization exercising corporate powers under certain regulations have a right to refuse to renew the lease of a pew in the church, on the expiration of the term for which it was leased; and such refusal, unless it appear to be a mere cloak for malice, gives the dispossessed tenant no claim for damages.⁶ The trustees of a free church may assign seats, and forcibly remove one from a seat occupied without authority.⁷ Where a pew in a meeting-house recently built was transferred with a covenant that it was free

¹ Colby v. Northfield etc. Cong. Soc., 63 N. H. 63.

⁴ Church v. Wells, 24 Pa. St. 249.

² Kellogg v. Dickinson, 18 Vt. 273; Wentworth v. Church, 3 Pick. 344.

⁵ Barnard v. Whipple, 29 Vt. 401; 70 Am. Dec. 423.

³ Ebaugh v. Hendel, 5 Watts, 43; 30 Am. Dec. 291.

⁶ Johnston v. St. Andrew's Church, 1 Cent. L. J. 410.

⁷ Sheldon v. Vail, 28 Hun, 354.

from all encumbrances, it was held that the liability of the pew to an assessment to defray the expenses of building the meeting-house was not an encumbrance within the meaning the covenant.¹

ILLUSTRATIONS. — A deed of land "for church purposes" contained a condition that if the seats of any church thereon should be "rented or sold," the land should revert. The land, with the church erected thereon, was sold under judicial proceedings to pay debts of the church. *Held*, not a breach of the condition. *Woodworth v. Payne*, 74 N. Y. 196; 30 Am. Rep. 298. A statute provides for the sale of a meeting-house under order of court, and for a distribution of the proceeds, where it is owned by two or more religious societies, or where two or more societies own pews in it. *Held*, not to authorize pew-owners to require a sale of the meeting-house: *Trinitarian Cong. Soc. v. Union Cong. Soc.*, 61 N. H. 384. A parish sold pews under the following conditions: "The sum bid for choice and one third of the appraised value shall be paid in cash, one third part in one year, and the residue in two years, with interest; the first payment to be forfeited if the other payments are not made agreeably to the above conditions." *Held*, that a purchaser who made the first payment and took possession, and continued in possession three years without further payment, acquired no title to the pew: *First Parish v. Spear*, 15 Pick. 144. The pews of a church were, by vote of the congregation, sold at auction, free of rent, for the purpose of raising money to complete the building. A purchased a pew, of which he remained in possession several years without any lease or other agreement as to the rent. In *assumpsit* by the trustees against him, to recover his proportion of the assessments laid by the corporation on the pews, in order to defray the salary of the minister, *held*, that A was not liable: *Trustees v. Quackenbush*, 10 Johns. 217. A church charter declared that the "subscribers, and such others as shall hereafter be admitted or become contributing members," should comprise the corporation, and that "any member who has contributed to the support of the church one year previous to the election about being held, a sum not less than two dollars for a pew or a portion of a pew," should have a vote. The society afterwards gave up the practice of renting pews, and announced free sittings, expenses to be met by contributions. *Held*, that the change was not an infraction of the constitution, and that renting or holding a particular pew or seat was not essential to membership: *Commonwealth v. Morrison*, 13 Phila. 135. A member of a church was the owner

¹ *Spring v. Tongue*, 9 Mass. 28; 6 Am. Dec. 21.

of a pew in the church building, for which he paid a tax of a certain amount, and the church was remodeled, and he chose a pew at a higher price. *Held*, that his acceptance of the new pew amounted to an abandonment of the old one, and a waiver of all the conditions and stipulations contained in his deed: *Curry v. First Pres. Cong.*, 2 Pittsb. Rep. 40.

§ 619. Rights, Duties, and Liabilities of Pastor or Priest.—In the United States, the property of the church, its revenues, its parsonage, if it have any, its church edifice, and the like, belong to the corporation;¹ and the clergyman has no rights or estate in any of them, other than such as are conferred by express contract.² Where a religious society employs a pastor for a certain cash salary and the use of the parsonage as a residence, the right to the use of the parsonage does not pass to the administrator of the pastor.³ A minister cannot be put in possession of the temporalities of an incorporated religious society without the consent of the trustees.⁴ Where a building is held by a Catholic bishop in his own name, but the money for its erection is contributed by the congregation, and the regulations forbid the disposal of it by him, the congregation have no right to pull it down, though out of repair, against his will.⁵ A special fund raised by the congregation of a Roman Catholic Church belongs to the congregation, and not to the priest or bishop.⁶ Money deposited in bank by the pastor of a church, from general contributions, is not the property of the church in such a sense that it can be taken in satisfaction of an execution against the church.⁷

¹ See *People v. Fulton*, 11 N. Y. 84; *Wyatt v. Benson*, 23 Barb. 327; 4 Abb. Pr. 182; *Sohier v. Trinity Church*, 109 Mass. 1.

² *Youngs v. Ransom*, 31 Barb. 49.

³ *East Norway etc. Church v. Froislie*, 37 Minn. 447.

⁴ *Lawyer v. Cipperly*, 7 Paige, 281. A person elected by a Methodist society to be one of their local preachers, and ordained as a deacon of the Meth-

odist Episcopal Church, is a minister of the gospel within the meaning of a statute providing exemption from taxation for ministers, though he has no authority to administer the sacrament of the communion: *Baldwin v. McClinch*, 1 Greenl. 102.

⁵ *Heiss v. Vosburg*, 59 Wis. 532.

⁶ *Amist v. Gelhaus*, 71 Iowa, 170.

⁷ *People's Bank v. St. Anthony's Church*, 38 Hun, 330.

The pastor has a right to enter the church on all occasions set apart for divine worship.¹ The trustees may be compelled by *mandamus* to admit a minister of the Methodist Episcopal Church appointed by the bishop.² Or an injunction will lie to prevent their closing the doors of the church against him.³ But *mandamus* will not lie to compel a local church to receive as its pastor one appointed by the ecclesiastical organization of which the local church is a member, where the church property is vested in and subject to the disposition of the local church, and no salary has been agreed on, nor rents of the church property directed to be applied to the payment of the pastor's salary, so as to vest in him a temporal right of which the civil courts can take jurisdiction.⁴ If the salary of a minister is not paid, he may recover by action against the corporation.⁵ A contract to pay an annual salary to the pastor of a church, so long as he should continue to officiate as such pastor, can only be dissolved by mutual consent.⁶ Even where the election of a church vestry is illegal, a minister employed by them, and having no notice of the illegality, will be entitled to the stipulated compensation.⁷ In the Episcopal Church, the rector is a member of the vestry, and is entitled to vote in filling a vacancy, but he cannot vote with the minority, and also give a casting vote as presiding officer of the vestry.⁸ An injunction will lie, at the suit of the trustees of a religious society, to restrain

¹ *Lynd v. Menzies*, 33 N. J. L. 162.

² *People v. Steele*, 2 Barb. 397; 1 Edm. Sel. Cas. 505; *People v. Conley*, 42 Hun, 98.

³ *Whitecar v. Michenor*, 37 N. J. Eq. 6.

⁴ *State v. Bibb St. Church*, 84 Ala. 23.

⁵ *Ebaugh v. German Ref. Church*, 3 E. D. Smith, 60; *Landers v. Frank St. Church*, 15 Hun, 340; *Myers v. Baptist Society*, 38 Vt. 614; *Thompson v. Catholic Cong. Soc.*, 5 Pick. 469;

Jones v. Mt. Zion Cong., 30 La. Ann. pt. 1, 711. But see *Landers v. Frank St. Church*, 97 N. Y. 119. A levy made on the church communion service, to satisfy a judgment obtained by a pastor against the trustees for his salary, was held to be invalid: *Lord v. Hardie*, 82 N. C. 241; 33 Am. Rep. 683.

⁶ *First Religious Soc. v. Stone*, 7 Johns. 112.

⁷ *Vestry of St. Luke's Church v. Mathews*, 4 Desaus. Eq. 578.

⁸ *Neilson's Appeal*, 105 Pa. St. 180.

a clergyman not chosen according to the usages of such society from using its building for the purpose of conducting religious services.¹ So a pastor of a congregational church will be enjoined from usurping his office and using the church edifice, having been dismissed by a majority of the church.² But no religious teacher or minister can be enjoined from receiving voluntary contributions, even though he has been deposed by some ecclesiastical judicatory.³

Where a minister is called to a parish, and nothing is said as to the term, the relation cannot be dissolved at the will of the parish.⁴ The engagement is for life, unless otherwise expressed, subject to the usages and rules of the congregation, which may dissolve it sooner.⁵ The church judicatories cannot remove a minister without the consent of a majority of the members of the congregation, or of their legally constituted trustees, if they are incorporated.⁶ The vestrymen of the parish of a Protestant Episcopal Church cannot indirectly remove a rector canonically elected, by reducing his salary as fixed at the time of his election.⁷ But where a rector is called and elected "permanently," this does not mean that he cannot be removed.⁸

¹ First Cong. Church v. Stewart, 43 Ill. 81.

² Hatchett v. Mt. Pleasant Baptist Church, 46 Ark. 291.

³ Calkins v. Cheney, 92 Ill. 463.

⁴ Avery v. Inhabitants, 3 Mass. 160; 3 Am. Dec. 105. In Massachusetts a minister seised of parsonage lands in the right of the parish is a sole corporation for this purpose, and holds the same to himself and his successors, and on his resignation, deprivation, or death, the fee is in abeyance until his successor is appointed: Weston v. Hunt, 2 Mass. 500; Brunswick v. Dunning, 7 Mass. 445; Brown v. Porter, 10 Mass. 93.

⁵ Gibbs v. Gilead Soc., 38 Conn. 153; Worrell v. Church, 23 N. J. Eq. 96.

⁶ First Baptist Church v. Witherell, 3 Paige, 296; 24 Am. Dec. 223.

⁷ Bird v. St. Mark's Church, 62 Iowa, 567.

⁸ Perry v. Wheeler, 12 Bush, 541, the court saying: "Appellant, by his counsel, insists that he was the permanent rector of Grace Church, and had the right to retain his position during life, unless he should become incapacitated for the performance of clerical duties by age, disease, or unless he should disqualify himself by immoral or unchristian conduct, or by the abandonment of the faith and the practices of the Protestant Episcopal Church. He certainly was elected permanent rector, but we do not understand the word 'permanent' as used in this case to mean that the parties were to be bound together by ties to be dissolved only by mutual consent, or for sufficient legal or ecclesiastical reasons. A connection of that character might, and in some cases probably would, result in compelling an unwilling pastor to remain with his congregation, or a

The profession of a Roman Catholic priest is his property, and the prohibition of the exercise of that profession by a higher church officer, without accusation or hearing, is a proceeding contrary to the law of the land, which a court of equity will restrain.¹ So the court will enjoin a vestry from ejecting a rector from his parish without a formal trial according to the canons of the church.² No action lies by a Roman Catholic priest against his bishop for salary or support during a period for which the bishop refused to assign him a charge,³ nor for removing him from his office of priest.⁴ A Roman Catholic bishop is not liable for money borrowed by a pastor for the use of the church.⁵

ILLUSTRATIONS.—A bill in equity was filed by the trustees of an independent church organization to restrain the pastor from longer officiating as such; it appeared that the church had no connection with any religious denomination, but was governed by its own rules and customs. One of the customs of the church and society was to elect a pastor every year. In this way, the defendant was elected in 1868, 1869, and 1870, and again in 1871, and he accepted. After the last election, the church session and the church trustees decided not to retain him, but he declined to leave, the trustees claiming that they had the sole power to employ a pastor. They, however, failed to establish this claim. *Held*, no ground for the interference of a court of equity, it appearing that he remained in obedience to the vote of a majority of the society, whose wishes, according to the usages of the church, should control: *Trustees v. Proctor*, 66 Ill.

dissatisfied congregation to retain and pay an unpopular and distasteful minister, after the feeling of estrangement had become so intense that the continuance of the pastoral relation would tend to tear down and destroy rather than preserve or build up the cause of Christianity, and the moral and religious interests of the local church. We understand that Dr. Perry was called as the rector of the church for an indefinite period, and that it was intended that he should continue to hold the place until one or the other of the contracting parties should desire to terminate the connection, in which case the dissatisfied party was to have

the right to be relieved of further obligations to the other upon fair and equitable terms, and after reasonable notice, and with the concurrence or approval of the ecclesiastical authority of the diocese."

¹ *O'Hara v. Stack*, 90 Pa. St. 477.

² *St. Clement's Church Case*, 8 Phila. 251.

³ *Tuigg v. Sheehan*, 101 Pa. St. 363; 47 Am. Rep. 727; and see *Rose v. Vertin*, 46 Mich. 457; 41 Am. Rep. 174.

⁴ *O'Donovan v. Chatard*, 97 Ind. 421; 49 Am. Rep. 462.

⁵ *Leahey v. Williams*, 141 Mass. 345.

11. Several persons, wishing to form a religious association, conveyed land to trustees in trust to support a certain minister, and such others as he should nominate, to preach to the congregation. *Held*, that such minister had no right to make a nomination for a pecuniary consideration: *Combe v. Brazier*, 2 Desaus. Eq. 431. A Congregational minister was settled in a town, and upon his decease, a successor of the same denomination was settled. *Held*, that the latter succeeded to all the rights of the former, and could recover possession of land belonging to the parish: *Jewett v. Burroughs*, 15 Mass. 464. A society engaged the plaintiff to preach for them for three hundred dollars for the first year. About the commencement of the second year the committee informed him that the subscription papers had been circulated and the amount subscribed was less than the first year, but that they could promise him no more than what could be raised by subscription, and the plaintiff agreed to remain for such sum as could be thus raised, the defendant promising to make further efforts to increase the amount. *Held*, that the society was bound to use due diligence in procuring and collecting the subscriptions, and that the plaintiff could look to the defendant for compensation for his services, and could recover such an amount as might have been so collected, but was not entitled to recover upon a *quantum meruit* unless by the fault or neglect of the defendant it was rendered impossible to estimate the compensation by the stipulations of the contract: *Myers v. Baptist Society*, 38 Vt. 614. The plaintiff sued for an assault committed in an effort to remove her from a room in an almshouse, of which almshouse the plaintiff's husband was keeper, and of which she was in charge at the time, where one of the defendants, a Catholic priest, was endeavoring to administer the sacrament of penance to a sick woman, who was a Catholic, and believed said sacrament essential to her, and was an inmate of the house, and had requested him to administer it, and which administering required entire secrecy between said priest and the sick person; plaintiff having refused to leave the room after being requested to retire, a sufficient and proper amount of force was used to compel her to leave. *Held*, that there was nothing in the priestly character of the defendant, or in the offices of religion which he was about to perform, that gave him the control of the room, or any legal authority to exclude or remove from it by force any person lawfully there: *Cooper v. McKenna*, 124 Mass. 284; 26 Am. Rep. 667.

§ 620. Jurisdiction of Civil Courts—Personal Rights—Property Rights—Decisions of Church Courts.—The decisions of the highest church courts on matters of dis-

cipline and faith are accepted as final and binding by the civil courts.¹ The latter will not interfere in such cases, to inquire into the jurisdiction of the spiritual court, but if its decisions are not found to contravene public policy, or the general law of the state, they should be accorded the full force and effect which the constitution, rules, and course of discipline of the religious body involved ascribe to them.² If a member is convicted of a moral delinquency, and is expelled by a decree of the legally constituted church judicatory,³ the courts have no control in the matter, and a *mandamus* will not lie to reinstate the expelled member.⁴ Where a presbytery have decided that certain members of a Presbyterian church under its jurisdiction have seceded, the decision binds the civil courts, and the seceders, although a majority, lose their rights to the church property.⁵ In a recent case, where the trial of a minister of the church courts was sought to be restrained, the supreme court of Illinois held: 1. That the fact that the commission issued by the bishop, appointing persons to investigate the charge and make presentment, was irregularly issued, would not affect the jurisdiction of the ecclesiastical court; 2. The ecclesiastical court is the exclusive judge of the sufficiency of the presentment; 3. Such court is not bound by the rules of law as to challenge of jurors; 4. Where there is no right of property involved except clerical office or salary, the

¹ McGinnis v. Watson, 41 Pa. St. 9; Watson v. Jones, 13 Wall. 679; Lucas v. Case, 54 N. H. 297; Atty.-Gen. v. Geerlings, 55 Mich. 562. The canon law of the Roman Catholic Church is without force or authority as such in Vermont, and is to be considered in determining the legal rights of parties only so far as it is recognized in or made part of some agreement under which those rights are derived: O'Hear v. De Goesbriand, 33 Vt. 593; 80 Am. Dec. 653.

² Shannon v. Frost, 3 B. Mon. 258; German Ref. Church v. Seibert, 3 Pa.

St. 291; Chase v. Cheney, 58 Ill. 509; 11 Am. Rep. 95; Harrison v. Hoyle, 24 Ohio St. 254; First Bap. Church v. Witherell, 3 Paige, 296; 24 Am. Dec. 223; Rosh's Appeal, 69 Pa. St. 462; 8 Am. Rep. 275; Grovenor v. United Society, 118 Mass. 78; Lucas v. Case, 54 N. H. 297.

³ See Part VI.

⁴ State v. Hebrew Cong., 30 La. Ann. 205; 33 Am. Rep. 217; People v. German Church, 3 Lana. 434; 53 N. Y. 103.

⁵ Gaff v. Greer, 88 Ind. 122; 45 Am. Rep. 449.

spiritual court is the exclusive judge of its own jurisdiction.¹ Whether a person died in the faith of the Roman Catholic Church, so as to be entitled to interment in a Roman Catholic cemetery, is not a question within the jurisdiction of the civil courts, but must be decided by the ecclesiastical authorities.² But the civil courts will interfere with churches or religious societies when rights of property or civil rights are involved, and will give relief to the parties aggrieved.³ The courts will interfere when property of a religious body, dedicated to religious purposes, has been taken from its members by the mere arbitrary will of those constituting the judicature of the organization, without regard to regulations or constitutional restraint by which such property was intended to be protected. Those having control of church property under a particular church organization have no power to transfer it to a different sect or denomination, or to divert it from the purposes for which it was dedicated, when in violation of the fundamental law upon which the organization is based.⁴ Where some of the officers and members of an independent church forcibly intrude into the church an instrument of music and a form of worship contrary to the established laws of the church, against the wish of a majority of the members, their action will be restrained in equity.⁵

§ 621. Voluntary Subscriptions to Church.—Voluntary subscriptions for charitable or religious objects are valid and binding in law, the implied undertaking of the promisee to appropriate the funds subscribed in conformity with the terms and objects of the subscription being deemed a sufficient consideration, in the absence of any other, for

¹ *Chase v. Cheney*, 58 Ill. 509; 11 Am. Rep. 95.

² *McGuire v. Trustees of St. Patrick's Cathedral*, N. Y. S. C., 1889.

³ *Watson v. Avery*, 2 Bush, 332; *Grimes v. Harmon*, 35 Ind. 198; 9

Am. Rep. 690; *Batterson v. Thompson*, 8 Phila. 251; *Chase v. Cheney*, 58 Ill. 509; 11 Am. Rep. 95.

⁴ *Kinhead v. McKee*, 9 Bush, 535.

⁵ *Hackney v. Vawter*, 39 Kan. 615.

the promise of the subscriber.¹ Where several persons, having in view the organization of a religious society, unite in subscribing the necessary funds, the promise of each subscriber is a sufficient consideration for those of the others, and the money subscribed may be recovered by the trustees after incorporation.² An association having been formed, and having contracted for a lot or building in the lifetime of a subscriber, and with his express or implied consent, upon the faith of a subscription made to it before its formation, may recover upon the subscription, either from him or his representatives.³ So where the subscription is on condition that a certain amount shall be obtained, on the obtaining the amount the subscription is recoverable.⁴ A promise to convey land to a trustee for the benefit of a religious society, if such trustee and society will erect thereon a house for public worship, where the trustee and society built such house accordingly, is founded on a good consideration.⁵ Subscribers to erect a meeting-house, constitute a co-tenancy, and not a partnership, where they agree to pay the sums severally subscribed, the property of each in the house when erected to be in proportion to his subscription, and the whole to be sold on such terms as the majority shall approve; and a subscriber cannot maintain a suit in equity against his associates to adjust their respective liabilities where he has paid more than his share.⁶ Other members of a building committee appointed by an unincorpo-

¹ See *post*, title Contracts; *M. E. Church v. Garvey*, 53 Ill. 401; 5 Am. Rep. 51; *Lathrop v. Knapp*, 27 Wis. 214; *Cooper v. McCrimmin*, 33 Tex. 283; 7 Am. Rep. 268; *Caul v. Gibson*, 3 Pa. St. 416; *Gault v. Swain*, 9 Gratt. 633; *North Ecc. Society v. Matson*, 36 Conn. 26; *Northwestern Conf. v. Myers*, 36 Ind. 375; *Barnes v. Perine*, 12 N. Y. 18; *Williams College v. Danforth*, 12 Pick. 541; *Ryerss v. Congregation*, 33 Pa. St. 114; *McDonald v. Gray*, 11 Iowa, 508; 79 Am. Dec. 509.

² *Reformed Church v. Brown*, 4 Abb. App. 31; *Christian College v. Handly*, 49 Cal. 347; *Willard v. M. E. Church*, 66 Ill. 55; *Wilson v. First Presb. Church*, 56 Ga. 554; *Ryerss v. Cong. of Blossburg*, 33 Pa. St. 114; *Petty v. Christ Church*, 95 Ind. 278.

³ *Phipps v. Jones*, 20 Pa. St. 260; 59 Am. Dec. 709.

⁴ *Kentucky etc. Soc. v. Carter*, 72 Ill. 247.

⁵ *Macon v. Sheppard*, 2 Humph. 335.

⁶ *Woodward v. Cowing*, 41 Me. 9; 66 Am. Dec. 211.

rated religious association to superintend the erection of a church may maintain an action to enforce a promise by one of their number to pay a certain amount toward the expenses of the edifice, although they have finished the edifice and have been discharged, for though *functi officio*, they are still trustees for the recovery of this debt, and it is of no consequence that the congregation has appointed another committee to wait upon the promisor, for they could not transfer this chose in action to another committee so as to enable them to sue in their own names.¹ A subscription for the purpose of erecting a church building may be assigned by the vestry in payment therefor; and the contractor who undertakes to build the church, and to whom the subscription has been assigned, may sustain an action therefor in his own name.² A subscriber cannot prove that he signed merely upon the assurance of the agent that he wanted his signature to influence others, and that he would never be called upon to pay the subscription.³

Notice by a subscriber that he will not pay does not revoke the subscription,⁴ nor does a notice by a subscriber to the treasurer to whom he has paid his subscription not to pay it over to the society.⁵ A promise to subscribe, made to one having no authority to act as agent for the society in soliciting subscriptions, may be retracted at any time before it has been accepted by a vote of the society, or by an authorized agent.⁶

ILLUSTRATIONS.—At the dedication of a church edifice, defendant and others, at the request of the person who conducted the services, made subscriptions “for the purpose of paying the expenses of building and furnishing such edifice.” Most, or possibly all, of the trustees of the church corporation met the evening before, and had some informal conversation, to the

¹ *Chambers v. Calhoun*, 18 Pa. St. 13; 55 Am. Dec. 583.

² *Hopkins v. Upshur*, 20 Tex. 89; 70 Am. Dec. 375.

³ *Blodgett v. Morrill*, 20 Vt. 509.

⁴ *Snell v. M. E. Church*, 58 Ill. 290.

⁵ *Church v. Crawford*, 43 N. Y. 476.

⁶ *M. E. Church v. Sherman*, 36 Wis. 404.

effect that subscriptions should be thus taken; but it was not proved that all were certainly present, or had received notice of such meeting; nor that there was any official meeting or action of the board of trustees; nor were such subscriptions accepted at any subsequent meeting of the board or corporation. *Held*, that defendant's subscription was not a valid contract: *Leonard v. Lent*, 43 Wis. 83. A subscription was raised for building a church, and upon letting the building at auction, defendants, who were not shown to have any other concern with the transaction, declared that if or when the work was done according to certain written specifications, and accepted, they would pay the sum at which the building should be bid off. Plaintiff became the contractor, and executed the work; but it was rejected because it was not executed according to the specifications in four particulars, in two of which it was shown that an alteration had been made with the assent of defendants. *Held*, that the alteration with the assent of defendants modified the contract to the extent of that assent, but left it subsisting as to other particulars; and that as to them the acceptance of the work was an essential term of defendant's engagement, without which plaintiff could not recover: *Young v. Jeffreys*, 4 Dev. & B. 216.

PART VIII.—CHARITABLE ASSOCIATIONS AND CHARITIES.

CHAPTER XXXV.

CHARITABLE ASSOCIATIONS AND CHARITIES.

- § 622. Charitable corporation — What is.
- § 623. Rights, powers and liabilities of.
- § 624. Jurisdiction over charities and charitable trusts — Statute of Elizabeth.
- § 625. Charity — What is — What is not.
- § 626. Charities favored in the law.
- § 627. Trustees.
- § 628. Proof of beneficiary — Parol evidence.
- § 629. Certainty and definiteness in object.
- § 630. The doctrine of cy-pres — Construction of bequests.
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- § 633. Privileges and exemptions — Taxation.
- § 634. Visitation of corporations — Powers of visitors.

§ 622. **Charitable Corporation—What is.**—A “charitable institution” is a corporation or other organized body created to administer charities, and which is permanent in its nature, as contradistinguished from a transient or temporary undertaking.¹ An incorporated society having for its object the promulgation of Christian knowledge and intelligence, through its agency as an institution of domestic missions, is a charitable institution.² So is one organized for the prevention of cruelty to animals.³

¹ *Humphries v. Little Sisters of the Poor*, 29 Ohio St. 201.

² *Maine Baptist Soc. v. Portland*, 65 Me. 92.

³ *Mass. Soc. v. Boston*, 142 Mass. 24, the court saying: “The institution was incorporated by statute of 1863, chapter 81, by the name of the Massachusetts Society for the Prevention of Cruelty to Animals. Its objects and purposes were not more specifically defined than by its title, nor

was any mode of accomplishing them pointed out. The methods adopted—by the dissemination of papers and essays; by lectures (inculcating not only the duty of humanity to, but the proper mode of dealing with and treating the domestic animals and their diseases); by organizing societies of members pledged to aid in the prevention of cruelty to them; by the employment of agents to aid in enforcing the laws on this subject—are legiti-

So is a parochial school.¹ So is a corporation organized for better opportunity and security in establishing and managing "schools, asylums, and other institutions for the relief, education, and care of the poor, the needy, the distressed, the orphan, and the ignorant."² So is a corporation having for its sole object the education and instruction of the deaf and dumb, supporting and instructing indigent persons of that class gratuitously, and receiving a pecuniary compensation from pupils able to make it; deriving its means of dispensing charity from the donations of individuals and of the public, and applying its funds exclusively to the general object of the institution.³ So is an association "for the protection of the property of our fellow-citizens from fire."⁴ A corporation is not the less "charitable" because its rules require an

mate means of effecting the general object indicated by its name. The society is also engaged in erecting and maintaining a hospital for homeless, neglected, and abused animals, where they may be kindly sheltered or humanely disposed of, which is also an appropriate mode of aiding in the prevention of cruelty to them. The act of incorporation must have contemplated all the legitimate and appropriate means of effecting their objects, which were of a general character and capable of influencing the public. The society may be properly defined as both benevolent and charitable. . . . Without discussing the question whether the word 'benevolent' is used substantially as synonymous with 'charitable,' or disjunctively, we are of opinion that the society also comes within the definition of a charity. There is no profit or pecuniary benefit in it for any of its members. Its work in the education of mankind in the proper treatment of domestic animals is instruction in one of the duties incumbent on us as human beings. These are charitable societies whose objects are to bring mankind under the influence of humanity, education, and religion: *Jackson v. Phillips*, 14 Allen, 539. The hospital founded by the institution

would, if it were established by a bequest or public or private gift, be treated as a charity. It has a humane, legal, and public or general purpose, and whether expressed or not in the statute of 43 Elizabeth, c. 4, which is the foundation of our law on the subject of charities, comes within the equity of that statute: *Cresson's Appeal*, 30 Pa. St. 437; *Townley v. Bedwell*, 6 Ves. 194; *Faversham v. Ryder*, 27 Eng. L. & Eq. 369. In the case of *University of London v. Yarrow*, 23 Beav. 159, it was held that a bequest for founding and upholding an institution for investigating, studying, and curing maladies of quadrupeds or birds useful to man, and for providing a superintendent or professor to give free lectures to the public, was good as a charitable legacy. The fact that the testator showed some interest in the animals themselves and their humane treatment in no way invalidated the gift."

¹ *Hennepin Co. v. Grace*, 27 Minn. 503.

² *Quinn v. Shields*, 62 Iowa, 129; 49 Am. Rep. 141.

³ *American Asylum v. Phoenix Bank*, 4 Conn. 172; 10 Am. Dec. 112.

⁴ *Bethlehem v. Perseverance Fire Co.*, 81 Pa. St. 445.

entrance fee from each applicant for admission,¹ or that patients able to pay for nursing and treatment shall do so;² nor the fact that no person has individually a right to demand admission into a public hospital, and that the trustees of the hospital determine who are to be received.³

A corporation for business purposes, although such purposes may incidentally contemplate benevolent results, is not a charitable association;⁴ nor is a benefit society whose benefits extend only to contributing members;⁵ nor is an institute of science, whose object is the "promotion and diffusion of general and scientific knowledge among the community at large, and the establishment and maintenance of a library and museum," but the benefits of which are restricted to members, except upon conditions prescribed by a board of managers;⁶ nor a corporation whose charter directed "that the profits of the company, after appropriating so much as may be judged necessary for promoting female education,—the object for which the association is formed,—shall be divided into equal portions between the members of the company";⁷ nor a corporation the expenditure of whose earnings is placed within the discretion of its board of trustees, and whose residual fund goes to pay them for their services;⁸ nor a cemetery association.⁹

§ 623. Rights, Powers, and Liabilities of.—A court of equity may control voluntary associations for charitable

¹ *Gooch v. Ass'n for Relief*, 109 Mass. 558.

² *McDonald v. Mass. Gen. Hospital*, 120 Mass. 432; 21 Am. Rep. 529; *State v. Powers*, 10 Mo. App. 263; *Hennepin v. Gethsemane Brotherhood*, 27 Minn. 460; 38 Am. Rep. 298.

³ *Gooch v. Ass'n for Relief*, 109 Mass. 558.

⁴ *People v. Nelson*, 46 N. Y. 477; 3 Lans. 324.

⁵ *State v. McGrath*, 95 Mo. 193; *Swift v. Beneficial Soc.*, 73 Pa. St. 362; *Morning Star Lodge v. Hayslip*, 23 Ohio St. 144. If not incorporated, its members

are regarded in law as partners in their relations to third persons, and the property of the associations must be appropriated to pay the debts of creditors who are not members, before it can be applied towards payment of the claims of its members: *Babb v. Reed*, 5 Rawle, 151; 28 Am. Dec. 650.

⁶ *Delaware County Institute v. Delaware County*, 94 Pa. St. 163.

⁷ *State v. Elliston*, 4 Baxt. 99.

⁸ *In re St. Louis Inst. of Christian Science*, 27 Mo. App. 633.

⁹ *Donnelly v. Boston etc. Ass'n*, 146 Mass. 163.

purposes in the disposition of their funds, and prevent them from diverting such funds to objects not authorized by their constitution and by-laws, unless with the consent of the contributors.¹ The president and trustees of a charitable corporation, there being no share-holders, may dissolve it;² and the property of the corporation, real and personal, acquired by purchase for value, thereupon vests in the state;³ but real property acquired and held by gift, remaining undisposed of, reverts to the donor or his heirs.⁴ Where a voluntary association for charitable purposes voted to transfer their funds to another society, appointed a committee to make the transfer, and ceased to meet for five years, it was held that the association was dissolved, and that subsequent proceedings were of no effect.⁵

A charitable corporation is not liable to the same extent as an individual to respond in damages for injuries received by third persons. In an English case it was held that where trustees of a charity are guilty of a breach of trust, the injured party is not entitled to indemnity out of the trust funds.⁶ In Massachusetts it has been held that where such a corporation has exercised due care in the selection of its agents, it is not liable for injury to a patient, caused by their negligence, nor for the unauthorized assumption of one of the hospital attendants to act as a surgeon.⁷ In a recent case in Maryland, it is ruled that the House of Refuge, being a corporation instituted for charitable purposes, cannot be made liable in damages for an assault committed by one of its officers on an inmate of the institution.⁸ But in Rhode Island

¹ *Penfield v. Skinner*, 11 Vt. 296.

² *People v. College of Cal.*, 38 Cal. 166.

³ *People v. College of Cal.*, 38 Cal. 166.

⁴ *People v. College of Cal.*, 38 Cal. 166.

⁵ *Penfield v. Skinner*, 11 Vt. 296.

⁶ *Foote v. Heriot's Hospital v. Ross*, 12 Clark & F. 507.

⁷ *McDonald v. Mass. Gen. Hospital*, 120 Mass. 432; 21 Am. Rep. 529.

⁸ *Perry v. House of Refuge*, 63 Md. 20; 52 Am. Rep. 495. In *Boyd v. Insurance Patrol Co.*, 113 Pa. St. 269, the supreme court of Pennsylvania said that whether or not the insurance patrol of the city of Philadelphia is a public agent of the municipality, or a charitable corporation, or a private

it is laid down that one who sustains injury at a public hospital from unskillful surgical treatment by an unqualified attending surgeon may maintain an action against the hospital therefor, although the hospital is a public charity supported by trust funds, and the plaintiff paid nothing but a small amount for board and attendance.¹

§ 624. Jurisdiction over Charities and Charitable Trusts — The Statute of Elizabeth. — By the statute of Elizabeth, Parliament enacted what uses were to be regarded as charitable, and therefore not within the law prohibiting gifts to corporations and others for superstitious uses. The gifts recognized as valid under the statute were for the relief of aged, impotent, and poor people for maintenance of sick and maimed soldiers; schools for learning; free schools; scholars in universities; houses of correction; for repairs of bridges, of ports and havens; of causeways, of churches, of sea-banks, of highways; for education and preferment of orphans; for marriage of poor maids; for support and help of young tradesmen, handicraftsmen, of persons decayed; for redemption or relief of prisoners or captives; for ease and aid of poor inhabitants concerning payment of fifteens; setting out of soldiers, and other taxes. This statute is held in several states to be in force and to be part of the common law of those states.² In a number of the states this statute

corporation for profit, cannot be determined solely by the language of the special act by which it was incorporated. Therefore, in an action against the corporation to recover damages for negligence of its servant, in which the court granted a nonsuit on the ground that it was a public charity, there being no evidence as to its character other than the charter, the supreme court, on writ of error, reversed the judgment, and awarded a *procedendo*, in order to show in what manner the affairs of the corporation had been conducted.

¹ *Glavin v. Rhode Island Hospital*, 12 R. I. 411; 34 Am. Rep. 675.

² *Maine*: *Howard v. Am. Peace Soc.*, 49 Me. 288; *Tappan v. Deblois*, 1 Me. 122; *Drew v. Wakefield*, 54 Me. 291; *Preachers' Aid Soc. v. Rich.*, 1 Me. 552. *Missouri*: *Mo. Hist. Soc. v. Academy of Science*, 94 Mo. 4. *Massachusetts*: *Old South Society v. Crocker*, 119 Mass. 1; 20 Am. Rep. 299; *Burbank v. Whitney*, 24 Pick. 135 Am. Dec. 312; *Going v. Emery*, 10 Pick. 107; 26 Am. Dec. 645; *Sanderson v. White*, 18 Pick. 328; 29 Am. Dec. 591; *Fellows v. Miner*, 119 Mass. 541. *Kentucky*: *Gass v. Wilhite*, 1 Dana, 170; 26 Am. Dec. 446. *Vermont*: *McAllister v. McAllister*, 46 Vt. 2. *Burr v. Smith*, 7 Vt. 241; 29 Am. Dec. 1.

held not in force, but to have been either specifically repealed along with other English statutes in force at the time of the Revolution, or never been adopted as a part of the English common law.' But though it was at one time thought that the statute of 43 Elizabeth conferred jurisdiction for the first time in the court of chancery over charities and charitable trusts,² this opinion is now overruled, and it is now held that the jurisdiction of equity over charities existed prior to and independently of 43 Elizabeth,³ that the statute did not confer jurisdiction on the court of chancery,⁴ but was merely intended to classify or enumerate certain charities which were enforceable in equity;⁵ and to provide a new and more effectual remedy for breaches of trust in that respect.⁶

154. *Connecticut*: Green v. Dennis, 6 Conn. 293; Brewster v. McCall, 15 Conn. 274; Am. Bible Soc. v. Wetmore, 17 Conn. 182. *North Carolina*: Griffin v. Graham, 1 Hawks, 96; 9 Am. Dec. 619.

¹ In *Maryland*: Dashiell v. Att'y-Gen., 5 Har. & J. 392; 9 Am. Dec. 572; Meade v. Beale, Taney's Dec. 339. In *Virginia*: Gallego v. Att'y-Gen., 3 Leigh, 450; 24 Am. Dec. 650; Seaburn v. Seaburn, 15 Gratt. 423; Baptist Ass'n v. Hart, 4 Wheat. 1; Wheeler v. Smith, 9 How. 79; Carpenter v. Miller, 3 W. Va. 174; 100 Am. Dec. 744; Roy v. Rowzie, 25 Gratt. 599, 607. In *Tennessee*: Dickson v. Montgomery, 1 Swan, 348; Frierson v. General Assembly, 7 Heisk. 683. In *New York*: Baacom v. Albertson, 34 N. Y. 584; Holmes v. Mead, 52 N. Y. 332; Ref. Church v. Mott, 7 Paige, 77; 32 Am. Dec. 613; Ayres v. Methodist Church, 3 Sand. 351, 367; Downing v. Marshall, 23 How. Pr. 4. In *Wisconsin*: Heiss v. Murphey, 40 Wis. 276. In *Indiana*: Grimes v. Harmon, 35 Ind. 198; 9 Am. Rep. 690. In *Illinois*: Plumleigh v. Cook, 13 Ill. 699. In *Ohio*: Perin v. Carey, 24 How. 465, 497. In *Pennsylvania*: Bethlehem v. Perseverance Co., 81 Pa. St. 445; Witman v. Le, 17 Serg. & R. 88; 17 Am. Dec. 644; Methodist Church v. Remington, 1 Waite, 218; 26 Am. Dec. 61. In *South Carolina*: Att'y-Gen. v. Jolly,

1 Rich. Eq. 99, 2 Strob. 379. In the *District of Columbia*: Ould v. Washington Hospital, 1 McAr. 541; 29 Am. Rep. 605; 95 U. S. 303. In *New Jersey*: Norris v. Thomson, 19 N. J. Eq. 307; 20 N. J. Eq. 489; De Camp v. Dobbins, 29 N. J. Eq. 36. In *Michigan*: Meth. Church v. Clark, 41 Mich. 741; Hathaway v. New Baltimore, 48 Mich. 254. In *Mississippi*: R. C. 1871, sec. 2440.

² Bapt. Ass'n v. Hart, 4 Wheat. 1.

³ Wright v. Methodist Church, 1 Hoff. Ch. 202; State v. Griffith, 2 Del. Ch. 392, 421; Incorporated Society v. Richards, 1 Dru. & War. 258; Vidal v. Girard, 2 How. 127; Burr v. Smith, 7 Vt. 241; 29 Am. Dec. 154; Urmev v. Wooden, 1 Ohio St. 160; 59 Am. Dec. 615.

⁴ Ould v. Washington Hospital, 1 McAr. 541; 29 Am. Rep. 605; 95 U. S. 303; State v. Griffith, 2 Del. Ch. 392, 421; Newson v. Starke, 46 Ga. 88; Heiss v. Murphey, 40 Wis. 276; Frierson v. General Assembly, 7 Heisk. 683; Meade v. Beale, Taney's Dec. 339; Board of Comm'rs v. Rogers, 55 Ind. 297; Shields v. Jolly, 1 Rich. Eq. 99; 42 Am. Dec. 349.

⁵ Thomson v. Norris, 20 N. J. Eq. 489, 522; Ould v. Washington Hospital, *supra*.

⁶ 2 Kent's Com., 12th ed., 283, and note; Perry on Trusts, sec. 724, note.

The rule in the United States is, that courts of equity, independently of the statute of Elizabeth, favor the doctrine of trusts for charitable uses, and have original and plenary jurisdiction over such trusts, and can maintain and enforce them by their own powers.¹ In Maryland, a court of chancery cannot, independently of the statute of Elizabeth, sustain and enforce a bequest to charitable uses, which would, if not a charity, be void on general principles.² In New York, courts of chancery possess only such powers as were exercised by the English court of chancery, irrespective of the statute of Elizabeth and *cy-pres* doctrine.³ Where a voluntary association holds a fund for charity toward its members, equity, for cause shown, will decree a dissolution and administer the fund, not by virtue of its jurisdiction over public charities or over partnerships, but by virtue of its jurisdiction over trusts.⁴

ILLUSTRATIONS. — A grant of land was made by the state to an educational corporation, the proceeds thereof to be devoted exclusively to the erection of buildings for its use, a bond being given by individuals to the state to secure the performance of this provision. By consolidation with another corporation, the donee secured all the buildings it needed, and afterwards appropriated the proceeds of the lands to its general needs. The sureties in the bond to the state then filed a bill to restrain the misappropriation. *Held*, that the bill should not be sustained: *Kiefer v. German American Seminary*, 46 Mich. 636. The bishop of an Episcopal diocese conceived and carried into execution the plan of building a church on the land of a corporation. He intended the church to be paid for from voluntary contributions, and of such sixty thousand dollars went into it, the bishop from his own means supplying the remaining ten thousand dollars. He undoubtedly expected to be paid back this amount from further contributions. He died. *Held*, that

¹ Board of Comm'rs v. Rogers, 55 Ind. 297; Williams v. Pearson, 38 Ala. 299; Miller v. Atkinson, 63 N. C. 537; Ould v. Washington Hospital, 95 U. S. 303; Dutch Church v. Mott, 7 Paige, 77; 32 Am. Dec. 613; Dodge v. Williams, 46 Wis. 91; Sowers v. Cyrenius, 39 Ohio St. 29; 48 Am. Rep. 418; Howard v. Am. Peace Soc., 49 Me.

289; Tappan v. Deblois, 45 Me. 122; Kniskern v. Lutheran Church, 1 Sand. Ch. 439; Howe v. Wilson, 91 Mo. 45; 60 Am. Rep. 226.

² Dashiell v. Att.-Gen., 5 Har. & J. 392; 9 Am. Dec. 572.

³ Owens v. Missionary Soc., 14 N. Y. 380; 67 Am. Dec. 160.

⁴ Burke v. Roper, 79 Ala. 138.

his administrator could not demand that the amount be declared a lien on the property: *French v. Griswold College*, 60 Iowa, 482.

§ 625. **Charity — What is — What is not.**—The definition of charity given by Mr. Binney in the Girard will case has been frequently cited and approved by the courts: "Whatever is given for the love of God or the love of your neighbor, in the catholic and universal sense,—given from these motives and to those ends, free from the stain or taint of every consideration that is personal, private, or selfish."¹ The definition of an English chancellor is more concise: "A gift to a general public use which extends to the poor as well as the rich."² "A charity in a legal sense," say the supreme judicial court of Massachusetts in a leading case,³ "may be more fully defined as a gift to be applied, consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government. It is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show that it is charitable in its nature." Gifts for charitable pur-

¹ See *Price v. Maxwell*, 28 Pa. St. 23; *Ould v. Washington Hospital*, 95 U. S. 303; *Jackson v. Phillips*, 14 Allen, 539. In *Old South Soc. v. Crocker*, 119 Mass. 22, 20 Am. Rep. 299, the court say: "Gifts for the erection of a house for public worship or for the use of the ministry may constitute a public charity if there is no definite body for whose use the gift was intended, capable of receiving, holding, and using it in the manner intended. To give it the character of a public charity, there must appear to be some benefit to be conferred upon or duty to be performed towards either the public at large or some part thereof, or an

indefinite class of persons: *Going v. Emery*, 16 Pick. 107; 26 Am. Dec. 645; *Perry on Trusts*, sec. 710; *Salt. enstall v. Sanders*, 11 Allen, 446. But when there is a body or a definite number of persons ascertained or ascertainable clearly pointed out by the terms of the gift to receive control and enjoy its benefits, it is not a public charity, however carefully and exclusively the trust may be restricted to religious uses alone: *Att'y-Gen. v. Meeting House*, 3 Gray, 1, 49; *Parker v. May*, 5 Cush. 336."

² *Jones v. Williams*, Amb. 652.

³ *Jackson v. Phillips*, 14 Allen, 539.

poses are classified as follows by Mr. Bispham:¹ 1. Gifts for eleemosynary purposes, as "to the poor," "to a parish," "for a hospital," "for orphans";² 2. Gifts for educational purposes, as education of poor children, schools, advancement of learning, libraries;³ 3. Gifts for religious purposes, as missionary and Bible societies, churches for foreign missions;⁴ 4. Gifts for erecting or maintaining public building or works, and lessening the burdens of government.⁵

¹ Bispham's Equity, secs. 168, 170.

² Heuser v. Allen, 42 Ind. 425; Att'y-Gen. v. Old South Society, 13 Allen, 474; McDonald v. Massachusetts Hospital, 120 Mass. 432; Vidal v. Girard's Ex'rs, 2 How. 128.

³ Heuser v. Allen, 42 Ind. 425; Fuller v. Plainfield Academy, 6 Conn. 544; Stevens v. Shippen, 28 N. J. Eq. 487; Gerker v. Purcell, 25 Ohio St. 229; Donohugh's Appeal, 86 Pa. St. 306; Chapin v. School Dist., 35 N. H. 445; Franklin v. Armfield, 2 Sneed, 305; Taylor v. Bryn Mawr College, 34 N. J. Eq. 101.

⁴ Carter v. Balfour, 19 Ala. 814; Grissom v. Hill, 17 Ark. 483; Fairbanks v. Lawson, 99 Mass. 533.

⁵ Jackson v. Phillips, 14 Allen, 550. In a note to Hesketh v. Murphy, 35 N. J. Eq. 23, the reporter has collected a large number of cases in which gifts and bequests for charitable uses have been sustained by the courts. Among the English cases, early and recent, are the following: To poor men decayed by misfortune or the visitation of God: Skinner's Case, Moore, 129; for the marriage of poor virgins: Porter's Case, 1 Coke, 26; for poor dissenting ministers living in any county: Waller v. Childs, Amb. 524; to place out apprentices and to be lent to decayed tradesmen: Att'y-Gen. v. Coventry, 2 Vern. 397; Colles's P. C. 280; to the poor inhabitants of S.: Att'y-Gen. v. Clarke, Amb. 422; to the poor: Att'y-Gen. v. Rance, Amb. 422; Att'y-Gen. v. Peacock, Finch, 245; for the poor inhabitants of S. in the county of H. and of B. in the county of H.: Hereford v. Adams, 7 Ves. 324; for the relief of the poor of S.: Att'y-Gen. v. Wilkinson, 1 Beav. 372; to church-war-

dens, to distribute among twelve poor people who had lived in the parish for twelve years "in honest fame and opinion": Att'y-Gen. v. Bovill, 1 Phill. 762; for the aid and relief of the poor citizens and inhabitants of E., "who are heavily burdened with the fee-farm rents of that city, and other impositions and talliages": Att'y-Gen. v. Exeter, 2 Russ. 45; 3 Russ. 395; to the poor inhabitants of T. R.: Rogers v. Thomas, 2 Keen, 8; to the widows and orphans of L.: Att'y-Gen. v. Comber, 2 Sim. & Stu. 93; to the widows and children of seamen belonging to the town of L.: Powell v. Att'y-Gen., 3 Meriv. 48; to such poor widows or creditable, industrious, unmarried women, upwards of forty years of age, residing in U. and C., having no relief from these places: Russell v. Kellett, 3 Sm. & Giff. 264; to the overseers of the poor of S., to be applied to their use and benefit, in aid of the poor-rate: Preece v. Howels, 2 Barn. & Ad. 744; for the relief of the widows and orphans of the clergy of W.: Kilvert's Trusts, L. R. 12 Eq. 183; 7 Ch. App. 170; for the education of poor children at a school about to be erected near C.: Society v. Price, 7 Irish Eq. 260; to the monks of S., to provide clothing for the poor children attending their schools: Carbery v. Cox, 3 Irish Ch. 231; for building a house for reduced gentlewomen: Att'y-Gen. v. Power, 1 Ball & B. 145; Att'y-Gen. v. Tancred, 1 Eden, 10; for clothing such poor children as should be educated in the school of the nunnery of W.: Id.; to the poor "on my little estate in S.": Bristow v. Bristow, 5 Beav. 289; among poor pious persons, male or female, old or infirm, as the executors

The following gifts or bequests have been sustained as charitable: To establish an institution "for the benefit,

see fit, not omitting large and sick families if of good character: *Nash v. Morley*, 5 Beav. 177; to be disposed of by A B and his executors, at their discretion, among poor housekeepers: *Att'y-Gen. v. Pearce*, 2 Atk. 87; to faithful domestic servants settled in G.: *Miller v. Rowan*, 5 Cl. & Fin. 99; see *Reeve v. Att'y-Gen.*, 3 Hare, 191; *Lascombe v. Winttingham*, 13 Beav. 87; to widows or poor orphans of non-conformist ministers not being at the time worth upwards of one hundred pounds a year, and widows being upwards of fifty years of age: *Att'y-Gen. v. Glegg*, 1 Atk. 356; to be yearly disposed of forever in relieving the distressed and poor about G., in meat, drink, and clothing, at the discretion of the executor forever: *Att'y-Gen. v. Johnson*, Amb. 190, note; "some donation out of my property to the poor of the different places where I have estates": *Price v. Canterbury*, 14 Ves. 363; in relieving such distressed persons, either the widows or children of poor clergymen, or otherwise, "as my said wife shall judge most worthy and deserving objects": *Waldo v. Coley*, 16 Ves. 206; see *Norris v. Thomson*, 19 N. J. Eq. 308; 20 N. J. Eq. 489; an annuity to three parishes of L. for the poor of the parishes, and the residue for the use of the poor in general forever: *Att'y-Gen. v. Mathews*, 2 Lev. 167; to trustees in such way as they might judge best calculated to promote the knowledge of the Catholic Christian religion among the poor and ignorant inhabitants of S. and W.: *West v. Shuttleworth*, 2 Myl. & K. 684; see *Att'y-Gen. v. Marchant*, L. R. 3 Eq. 424; to the vicar and church-wardens of the parish of O., for the benefit of the poor of the parish of O. and the adjoining parishes: *Att'y-Gen. v. Brandreth*, 1 You. & Coll. Ch. 200; see *Edinburgh v. Aubrey*, Amb. 236; to pay and divide the residue at Christmas every year forever amongst the aged poor of the parish: *Fisk v. Att'y-Gen.*, L. R. 4 Eq. 521; for the employment and support of the poor of the parish of R.: *Att'y-Gen. v. Blizard*, 21 Beav. 233; to commissioners of emigration for the benefit of poor persons emi-

grating to certain designated colonies: *Barclay v. Maskelyne*, 4 Jur., N. S., 1294; to forty decayed families that are come to poverty purely by losses unavoidable; to forty poor widows upwards of fifty years of age, and not worth forty pounds; to forty poor maidens whose parents formerly lived well and are come to decay; to twenty poor boys to clothe and put out to apprentice: *Att'y-Gen. v. Speed*, West Ch. 491; to be divided equally twice in the year between twenty aged widows and spinsters of the parish of P.: *Thompson v. Corby*, 27 Beav. 649; to purchase land to be let out to the poor at a low rent: *Crafton v. Frith*, 15 Jur. 737; see *Att'y-Gen. v. Leigh*, 2 Ves. 389; *Att'y-Gen. v. Whitechurch*, 3 Ves. 141; *Att'y-Gen. v. Draper's Co.*, 2 Beav. 508; *Reeve v. Att'y-Gen.*, 3 Hare, 191; for the relief of the poor in W.: *Wilkinson v. Martin*, 2 Crompt. & J. 636; to be distributed every Sunday after morning service by the minister and church-wardens of D. among so many poor of the parish as were most constant in attending divine service: *Ashton's Charity*, 27 Beav. 115; for the most poor and needy that be of good life and conversation that should be inhabiting the parish of K.: *Campden Charities*, L. R. 18 Ch. Div. 310; for providing a proper school-house for the instruction of twenty poor girls of the parish of B. in needlework, reading, and writing, and also for clothing them: *Johnston v. Swarm*, 3 Madd. 457; also *Att'y-Gen. v. Williams*, 2 Cox C. C. 387; *Att'y-Gen. v. Lepine*, 2 Swanst. 181; to the incumbent of U. for providing wine and bread for the sick poor of U.: *Birkett's Case*, L. R. 9 Ch. Div. 576; see *Strauss v. Goldsmid*, 8 Sim. 614; *Att'y-Gen. v. Haberdasher's Co.*, 1 Myl. & K. 420; in supporting or founding free or ragged schools for gutter children, or for the poorest of the poor: *Morley v. Croxon*, L. R. 8 Ch. Div. 156; see *School Board v. Falconer*, L. R. 8 Ch. Div. 571; to the incumbents of C. and S., to be divided equally amongst three poor sick or infirm people residing in their respective parishes: *Williams's Case*, L. R. 5 Ch. Div. 735; the surplus

tuition, and advancement in learning of the youth residing, from time to time hereafter, in the state of New Jersey";¹ to erect a town-house for town business;² to promote the propagation of Christianity among the heathen;³ for the circulation of Bibles and religious books;⁴ "in trust, that they may use the same to promote the religious interests of said church, and to aid the missionary, educational, and benevolent enterprises to which the said church is in the habit of contributing";⁵ "for the use of

to be given by testator's executors every year to poor pious members of the Methodist society of G. above the age of fifty years: *Dawson v. Small*, L. R. 18 Eq. 114; fifty pounds for the poor of L.: *Kane v. Coagrove*, L. R. 10 Irish Eq. 211; for an almshouse for aged men and women; for schools for poor boys and poor girls, and that every poor boy and girl when leaving the school have a "Whole Duty of Man," or some other of the books of devotion named; to redeem poor persons out of prison: *Att'y-Gen. v. Bishop of Limerick*, L. R. 5 Irish Eq. 403; see *Thrup v. Collett*, 26 Beav. 125; *Att'y-Gen. v. Painter Co.*, 2 Cox C. C. 51; to set the poor on work, and otherwise for the relief of the poor in such parishes and in such manner as the trustees named or their survivor should think fit, so as the parish of S. in the city of R. should be one of them: *Att'y-Gen. v. Ruller, Jac.* 407; to trustees to pay the interest and dividends to the poor inhabitants of the parish of L. in the county of M. forever, by half-yearly payments: *Att'y-Gen. v. Freeman*, Dav. 117; 5 Price, 425; see *Att'y-Gen. v. Ward*, 3 Ves. 328; to V., his executors, etc., desiring him to dispose of the same in such charities as he thought fit, recommending poor clergymen with large families and good characters: *Moggridge v. Thackwell*, 1 Ves. 464; 7 Ves. 36; bread to be distributed to poor persons attending divine service and chanting testator's version of the Psalms [which could not be chanted because not authorized]: *Brantham v. E. Burgold*, 2 Ves. 388; to give a quarter-loaf of bread to twenty persons weekly: *Limbrey v. Gurr*, 6 Madd. 151; a moiety to be laid out in buying

corn and firing, to be given to the poor of W. about Christmas or New-Year's day: *Att'y-Gen. v. Wisbech*, 6 Jur. 655; to buy and distribute one hundred and thirty-eight quarters of coal, or money to buy coals at eight pence per quarter, amongst the poor: *Yordon's Charity*, 5 Sim. 571; for clothing and educating eight boys in E.: *Latmyer's Charity*, L. R. 7 Eq. 353; for the garments of twelve poor men and twelve poor women at a specified price: *Merchant Tailors' Co. v. Att'y-Gen.*, L. R. 11 Eq. 35; see *Att'y-Gen. v. Wax Chandler's Co.*, L. R. 5 Ch. App. 503; to keep a house in readiness for the reception of poor plague-patients during their sickness, and for a burial-place for such as are deceased: *Att'y-Gen. v. Earl of Craven*, 21 Beav. 392; to poor relations, or in default of them, to poor persons in the county of A.: *Campbell v. Earl of Radnor*, 1 Bro. C. C. 271; to necessitated decayed freemen of a designated company, their widows and children, not exceeding ten pounds a year to any family: *Ironmonger's Co. v. Att'y-Gen.*, 10 Cl. & Fin. 908.

¹ *Stevens v. Shippen*, 28 N. J. Eq. 487.

² *Coggsall v. Pelton*, 7 Johns. Ch. 292; 11 Am. Dec. 471.

³ *Bartlet v. King*, 12 Mass. 536; 7 Am. Dec. 99.

⁴ *Attorney-General v. Stepney*, 10 Ves. 22; *Winalow v. Cummings*, 3 Cush. 358; *Fairbanks v. Lamson*, 99 Mass. 833; *Mason v. Meth. Church*, 27 N. J. Eq. 47; *Bliss v. Am. Bible Society*, 2 Allen, 334.

⁵ *De Camp v. Dobbins*, 29 N. J. Eq. 36.

a sabbath school, and the diffusion of Christian principles";¹ to and for the support, maintenance, and education of the poor white citizens of Kent County generally;² for the education of poor children belonging to the county;³ to the poor of Madison County;⁴ to the education of colored children in the state of Indiana;⁵ to the county of O. in the state of Indiana, for colored children of said county;⁶ for the sole relief and benefit of poor widows over the age of fifty years, of irreproachable character, who have resided not under three years within eight miles of the town of W., and who have no certain income;⁷ to the commissioners of L. County, for the use and benefit of the orphan poor, and for other destitute persons of said county;⁸ for educating some poor orphans of this county, to be selected by the county court, and to be confined to such as are not able to educate themselves;⁹ to the suffering poor of the town of A.;¹⁰ for the comfort, relief, and welfare of the poor and distressed within the city and neighborhood of P.;¹¹ to deserving relations, and such indigent persons as they, the executors, may think worthy of the same, and in such manner as they may think proper;¹² to the first committee of the school society in the town of R., for the use and benefit of such families in said society in their schooling as shall not exceed in the list of the town for the year the sum of fifty dollars;¹³ to purchase fuel, to be given or sold at low prices as may be deemed best by the trustees, to such worthy and industrious persons as are not supported in whole or in part at the public expense;¹⁴ to provide and sustain a home for respectable, destitute, aged, native-born American men and women;¹⁵ to provide

¹ *Morville v. Fowle*, 144 Mass. 109.

² *State v. Griffith*, 2 Del. Ch. 392.

³ *Newson v. Starke*, 46 Ga. 88.

⁴ *Heuser v. Harris*, 42 Ill. 425;

Prickett v. People, 88 Ill. 115.

⁵ *Lindley's Case*, 32 Ind. 367.

⁶ *Craig v. Secrist*, 54 Ind. 419.

⁷ *De Bruler v. Ferguson*, 54 Ind. 549.

⁸ *Coners v. Rogers*, 55 Ind. 297.

⁹ *Moore v. Moore*, 4 Dana, 354; 29 Am. Dec. 417.

¹⁰ *Howard v. Am. Peace Society*, 49 Me. 288.

¹¹ *Deering v. Adams*, 37 Me. 264.

¹² *Drew v. Wakefield*, 54 Me. 291.

¹³ *Birkhard v. Scott*, 39 Conn. 63.

¹⁴ *Webb v. Neal*, 5 Allen, 575.

¹⁵ *Odell v. Odell*, 10 Allen, 1.

religious tracts, and the distribution of the same among the destitute;¹ to found a school for testator's children and their descendants, and those of his brothers and sisters, and such of the poor children of the county as the trustees might select;² to the city of C., for the use and benefit of the poor of said city;³ to the ministry and vestry of the parish of L., for the use of the poorest inhabitants of said parish, being honest people;⁴ to be expended in the education of the scholars of poor people in the county of O.;⁵ for the education and tuition of worthy indigent females;⁶ to erect an orphan asylum in or near R., to be opened for the reception of all orphan children in said county, and such other poor, neglected, and destitute children as the managers may agree to receive;⁷ to the cities of N. and B., one half to each for the education of the poor in those cities;⁸ one thousand dollars to be paid by my executor for the education of the freedmen of this nation, his best judgment and discretion to be exercised in said appropriation;⁹ to V. and C., to be received and loaned out by three commissioners of V. and C., and applied by them to the education and tuition of all the pauper and poor children of V. and C., whose parents are not able to support them;¹⁰ for an asylum for destitute orphan boys and girls at M.;¹¹ for the benefit of the poor;¹² for the support of poor and old women;¹³ for the relief of the Jewish poor;¹⁴ for the benefit of needy single women and widows; for the education and instruc-

¹ *Attorney-General v. Jolly*, 1 Rich. Eq. 99; 2 Strob. Eq. 379.

² *Franklin v. Armfield*, 2 Sneed, 305; *Paschal v. Acklin*, 27 Tex. 173; *Perin v. Casey*, 24 How. 465.

³ *Hornberger v. Hornberger*, 12 Heisk. 635.

⁴ *Richmond Co. v. Tayloe*, Gilm. (Va.) 336.

⁵ *Clement v. Hyde*, 50 Vt. 716; 28 Am. Rep. 522.

⁶ *Dodge v. Williams*, 46 Wis. 70.

⁷ *Gould v. Taylor Orphan Asylum*, 46 Wis. 103.

⁸ *McDonough v. Murdock*, 15 How. 367.

⁹ *McAllister v. McAllister*, 46 Vt. 272; see *Meeting Street Soc. v. Hail*, 8 R. I. 234.

¹⁰ *Williams v. Pearson*, 38 Ala. 299.

¹¹ *Milne v. Milne*, 17 La. 46.

¹² *Loring v. Marsh*, 2 Cliff. 469.

¹³ *Gooch v. Association*, 109 Mass. 558.

¹⁴ *Mayer v. Soc.*, 2 Brewst. 385; also *Isaac v. Gompertz*, Amb. 228; *De Costa v. De Paz*, 2 Swanst. 490.

tion of poor and needy children in B.; to furnish them with necessary clothing while attending school;¹ for the education of pious, indigent youths;² for the five monthly meetings of women Friends held in P., towards the relief of the poor members belonging thereto;³ a devise of lands for a site for the erection of a hospital for foundlings;⁴ in trust for the county of A., for establishing and supporting a manual-labor school for poor white children of the county;⁵ to a lodge of Free Masons for the good of the craft, or for the relief of indigent and distressed worthy Masons, their widows and orphans;⁶ the use and income of money to be "expended in the education of the scholars of poor people" in a certain county;⁷ for the purchase and distribution of such religious books or reading as the trustees shall deem best;⁸ for the preaching of the Gospel as taught by the people known as Disciples of Christ, in two places in Ohio;⁹ to the trustees of an organized church in trust, to apply the interest to the suppression of the manufacture and sale of intoxicating liquors;¹⁰ to assist, relieve, and benefit poor and necessitous persons, and to assist and co-operate with any such charitable, benevolent, religious, literary, and scientific societies and associations, or any or either of them, as shall appear to the trustees best to deserve such assistance or co-operation;¹¹ to distribute a sum of money for benevolent objects;¹² for a charitable institution, to be incorporated by the name of the Smith Memorial Home, for aged, respectable, indigent women who

¹ *Swasey v. Am. Bib. Soc.*, 57 Me. 523.

² *McCord v. Ochiltree*, 8 Blackf. 15.

³ *Magill v. Brown*, Bright. 346.

⁴ *Ould v. Wash. Hospital*, 1 McAr. 541; 29 Am. Rep. 605; 95 U. S. 303.

⁵ *Kinnaird v. Miller*, 25 Gratt. 107.

⁶ *Duke v. Fuller*, 9 N. H. 538; 32 Am. Dec. 392.

⁷ *Clement v. Hyde*, 50 Vt. 716; 28 Am. Rep. 522.

⁸ *Simpson v. Welcome*, 72 Me. 496; 39 Am. Rep. 349.

⁹ *Sowers v. Cyrenius*, 39 Ohio St. 29; 48 Am. Rep. 418.

¹⁰ *Haines v. Allen*, 78 Ind. 100; 41 Am. Rep. 555.

¹¹ *Suter v. Hilliard*, 132 Mass. 412; 42 Am. Rep. 444.

¹² *Goodale v. Mooney*, 60 N. H. 528; 49 Am. Rep. 335.

have been residents of New London;¹ to aid in propagating the holy religion of Jesus Christ;² for the relief of the resident poor of a town;³ to establish a school in O. for the education of young persons in the domestic and useful arts;⁴ for the erection of a town-house for transacting town business;⁵ the interest of a certain sum to be laid out for ten years in bread for the poor of the Lutheran congregation of A.;⁶ towards the education of young students in the ministry of the German Lutheran congregation;⁷ to the native-born inhabitants of the town of A.;⁸ to two townships, of a fund to be invested on bond and mortgage for the benefit of their inhabitants, the interest to be divided in proportion to the number of inhabitants in each, for the purpose of educating their poor orphan children, and in case the interest should not all be consumed for this purpose, the balance to be appropriated annually to the poor widows of the township;⁹ to help form a Young Men's Christian Association;¹⁰ to the end that the interest be applied at discretion to alleviating the wants and sufferings of the deserving poor of M.;¹¹ to employ a preacher of the Universalist denomination;¹² to the treasurer of the county of O., and his successors in office, the income of said one thousand dollars, to be expended in the education of scholars of poor people in the county of O.;¹³ for establishing a school for the benefit, tuition, and advancement in learning of youth residing from time to time in the state of New Jersey, or for furnishing an education to such of the children of the city of H. as

¹ *Coit v. Comstock*, 51 Conn. 352; 50 Am. Rep. 29.

² *Hinkley v. Thatcher*, 139 Mass. 477; 52 Am. Rep. 719.

³ *Webster v. Morris*, 66 Wis. 366; 57 Am. Rep. 278.

⁴ *Id.*

⁵ *Coggeshall v. Pelton*, 7 Johns. Ch. 292; 11 Am. Dec. 471.

⁶ *Witman v. Lex*, 17 Serg. & R. 88; 17 Am. Dec. 644.

⁷ *Id.*

⁸ *Fellows v. Miner*, 119 Mass. 541.

⁹ *Mason v. M. E. Church*, 27 N. J. Eq. 47.

¹⁰ *Goodell v. Union Ass'n of Burlington Co.*, 29 N. J. Eq. 32.

¹¹ *Goodell v. Union Ass'n of Burlington Co.*, 29 N. J. Eq. 32.

¹² *Trustees v. Beatty*, 28 N. J. Eq. 487.

¹³ *Clement v. Hyde*, 50 Vt. 716; 28 Am. Rep. 522.

the authorities of the city, or the authorities of common schools in the city, shall permit to attend;¹ for the education and tuition of worthy indigent females;² to build and support a public school for the education of children as the law now directs;³ to a religious corporation for the procuring of masses to be said for the soul of the donor;⁴ the annual interest to be employed by designated trustees for "the relief of the most deserving of the poor of the city of Paterson aforesaid, forever, without regard to color or sex, but no person who is known to be intemperate, lazy, immoral, or undeserving, to receive any benefit from the said funds";⁵ a conveyance of land "in trust for the uses of a Sabbath-school, and for the diffusion of Christian principles as taught and practiced by Christian Evangelical denominations, with power to erect, repair, and renew from time to time all buildings necessary to carry out the object and purposes of the trust";⁶ a bequest to trustees to appropriate principal and interest, as they shall deem proper, to the aid of such needy and meritorious widows and orphans of a certain town as may need temporary help to keep them from becoming chargeable upon the town as paupers, it being discretionary with the trustees as to who shall be thus aided;⁷ a devise to an historical society, of a house containing a collection of books, documents, and works of art, in trust, to keep and preserve the same, with the collection therein, and other books and works of art to be purchased by the officers of the society out of the income of a fund bequeathed by the deviser for the purpose, "as a public edifice for a library and academy of arts and sciences," and "to be open for the use of the public," on such terms and under such reasonable regulations as the society may

¹ *Stevens v. Shippen*, 28 N. J. Eq. 487. In re *Hagenmeyer's Will*, 12 Abb. N. C. 432.

² *Dodge v. Williams*, 46 Wis. 70.

³ *Boxford etc. Soc. v. Harriman*, 125 Mass. 321.

⁴ *Ex parte Schouler*, 134 Mass. 426;

⁵ *Hesketh v. Murphy*, 36 N. J. Eq. 304.

⁶ *Morville v. Fowle*, 144 Mass. 109.

⁷ *Camp v. Crocker*, 54 Conn. 21.

prescribe (and this devise is not invalidated by a requirement to place and keep over the entrance a marble slab with the name of the testator engraved on it);¹ a bequest for the "charitable assistance and benefit" of a certain class of persons;² a devise of land to a town, directing "all the interest thereof to be laid out in repairing highways and bridges yearly, and not to be expended for any other use";³ a bequest of five thousand dollars to the Rev. J. T. S. of Boston, in trust, to apply the same to the relief of the destitute, in such manner as charity is usually distributed by the minister at large in the city of Boston;⁴ a bequest of money to the trustees of an organized church, in trust, to apply the interest to the suppression of the manufacture and sale of intoxicating liquors;⁵ a bequest to a cemetery association to build a chapel, or to use the income in improving the cemetery grounds;⁶ a gift dedicated to the encouragement of science and the useful arts;⁷ a legacy to the incorporated churches of a certain denomination in a certain city, "to the end that the poor of said respective churches may be cared for";⁸ a bequest "to be used exclusively for educating poor young men for the Episcopal ministry, upon the basis of evangelical principles as now established."⁹ A right reserved by the donor or contributor to share in the benefits of a charity does not render the object any the less a charity.¹⁰

But the following trusts have been held void as either not being valid objects of charity, or as not falling within the rules, hereafter mentioned, as to the requisites of a valid trust, viz., "to the infidel society of P. hereafter to be incorporated, to build a hall for the free discussion of

¹ *Jones v. Habersham*, 107 U. S. 174.

² *Tappan's Appeal*, 52 Conn. 412.

³ *Hamden v. Rice*, 24 Conn. 350.

⁴ *Derby v. Derby*, 4 R. I. 414.

⁵ *Haines v. Allen*, 78 Ind. 100; 41 Am. Rep. 555.

⁶ *Webster v. Morris*, 66 Wis. 366; 57 Am. Rep. 278.

⁷ *State v. Academy of Science*, 13 Mo. App. 213.

⁸ *Auch's Succession*, 39 La. Ann. 1043.

⁹ *Protestant Episcopal Education Society v. Churchman*, 80 Va. 718.

¹⁰ *Gass v. Wilhite*, 2 Dana, 170; 26 Am. Dec. 446.

religion, politics, etc.”;¹ “for any and all benevolent purposes” the trustees “may see fit”;² for a “Catholic reformatory for boys”; to the “most deserving poor of N.”;³ for the “education of the freedmen”;⁴ to “such worthy persons and objects” as trustees should deem proper, for “such charitable purposes” as trustees should deem proper;⁵ to the “orthodox Protestant clergymen of” P., for the “education of colored children, both male and female, as they deem best”;⁶ to be distributed by the trustees to “persons, societies, or institutions,” in their discretion;⁷ “solely for benevolent purposes”;⁸ for the “establishment of a school” at M., for the education of children;⁹ to benevolent associations of a city for the “benefit of white and colored children”;¹⁰ to “benevolent, religious, or charitable institutions,” in trustees’ discretion;¹¹ “to foreign missions and poor saints”;¹² “for all Christians who acknowledge the divinity of Christ,” etc.;¹³ to be distributed “among such incorporated societies, organized under the laws of the state of New York and Maryland, having lawful authority to receive and hold funds upon permanent trusts for charitable and educational uses,” to be selected by the trustee;¹⁴ for the “support of indigent, respectable” females and orphans;¹⁵ to any “other person or persons who may be in distress”;¹⁶ for such purposes as the trustees “consider as promising most to

¹ *Zeisweiss v. James*, 63 Pa. St. 465; 3 Am. Rep. 558.

² *Adye v. Smith*, 44 Conn. 60; 26 Am. Rep. 424.

³ *Hughes v. Daly*, 49 Conn. 34.

⁴ *Fairfield v. Lawson*, 50 Conn. 501; *contra*, see *McAllister v. McAllister*, 46 Vt. 272.

⁵ *Bristol v. Bristol*, 53 Conn. 243.

⁶ *Grime v. Harmon*, 35 Ind. 198; 9 Am. Rep. 690.

⁷ *Nichols v. Allen*, 130 Mass. 211; 39 Am. Rep. 445.

⁸ *Chamberlain v. Stearns*, 111 Mass. 267.

⁹ *Att’y-Gen. v. Soule*, 28 Mich. 153.

¹⁰ *Watson’s Society v. Johnston*, 58 Md. 139; *Needles v. Martin*, 33 Md. 609.

¹¹ *Norris v. Thompson’s Ex’rs*, 19 N. J. Eq. 307.

¹² *Bridges v. Pleasants*, 4 Ired. Eq. 26; 44 Am. Dec. 94.

¹³ *White v. Att’y-Gen.*, 4 Ired. Eq. 19; 44 Am. Dec. 92.

¹⁴ *Prichard v. Thompson*, 95 N. Y. 76; 47 Am. Rep. 9; *Fontain v. Ravenel*, 17 How. 369.

¹⁵ *Beekman v. Bonsor*, 23 N. Y. 298; 80 Am. Dec. 269.

¹⁶ *Hill’s Ex’rs v. Bowman*, 7 Leigh, 657.

benefit the town and trade of" A.;¹ "to secure the passage of laws granting women the right to vote, hold office, and all other civil rights";² a bequest to a certain Sunday school in M., "to be safely invested, the interest to be applied to making Christmas presents to the scholars of said school";³ a devise to two, "their heirs and assigns forever, and to the survivor of them and his heirs forever, in trust, to sell, dispose of, invest, and manage the same, and appropriate such part of the principal and interest as they may deem best, for the aid and support of those of my children and their descendants who may be destitute, and in the opinion of said trustees need such aid";⁴ a bequest in perpetuity to keep a private burying-ground in repair;⁵ a provision by will for perpetually preserving, adorning, and repairing a private mortuary monument.⁶

§ 626. **Charities Favored in the Law.**—Charities, it is laid down, are highly favored in the law, and the court will carry out the intention of a donor or testator for a charitable purpose whenever it possibly can.⁷ A testamentary gift for purposes both public and benevolent, shown by the will to be inspired by philanthropy and aimed at permanent good, is a charitable gift, it appearing that the testator used the term "benevolence" in the legal sense of charity.⁸ So in case of a charity it is said the court will supply all defects of conveyances where the donor has capacity and a disposable estate, and his mode of donation does not contravene the provisions of any statute.⁹ It is not necessarily a fatal objection to a bequest to a foreign

¹ *Wheeler v. Smith*, 9 How. 55.

² *Jackson v. Phillips*, 14 Allen, 539.

³ *Goodell v. Union Ass'n*, 29 N. J. Eq. 32.

⁴ *Kent v. Dunham*, 142 Mass. 216; 56 Am. Rep. 667.

⁵ *Johnson v. Holifield*, 79 Ala. 423; 58 Am. Rep. 596; *Coit v. Comstock*, 51 Conn. 352; 50 Am. Rep. 29.

⁶ *Bates v. Bates*, 134 Mass. 110; 45 Am. Rep. 305.

⁷ *Pocock v. Att'y-Gen.*, L. R. 3 Ch. Div. 342; *Sanderson v. White*, 18 Pick. 328; 29 Am. Dec. 591; *Raley v. Umatilla Co.*, 15 Or. 172; 3 Am. St. Rep. 142.

⁸ *Pell v. Mercer*, 14 R. I. 412.

⁹ *Story's Eq. Jur.*, sec. 1171; *Sayer v. Sayer*, 7 Hare, 377; *Innes v. Sayer*, Mac. & G. 606; *Gilmer v. Stone*, 120 U. S. 586.

charity, that the provisions of the bequest are somewhat inconsistent with the original charity, provided they are not so repugnant thereto as to defeat any of the intentions or objects of the founders; for although the trustees of the original charity are not bound to accept the bequest on the terms imposed, still if they do accept it, they will be bound to adhere to those terms.¹ It is a well-established principle that if the bequest be for a charity, it matters not how uncertain the persons or the objects may be, or whether the persons who are to take are *in esse* or not, or whether the legatee be a corporation capable in law of taking or not, or whether the bequest can be carried into operation or not;—for in all these and the like cases, a court of equity will treat it as a valid charitable bequest, and will dispose of it for such charitable purposes as it shall think fit. But the object must be distinctly charitable, in order to the court construing it in that favorable way; and therefore where the bequest may, in conformity to the express words of the will, either be disposed of in charity of a discretionary private nature, or be employed for any general, benevolent, or useful purpose, or for any general purpose, whether charitable or otherwise, or for charitable or other general purposes at discretion, the bequest will be void, as being not exclusively charitable, and also too general and indefinite for a court of equity to execute. Hence if a man bequeaths a sum of money to such charitable uses as he shall direct, by codicil annexed to his will, or by note in writing, and he leaves no direction by codicil or note or writing, a court of equity, applying the rule that the nomination of the particular objects is only the mode, and the gift to the charity the substance, of the testamentary disposition, will carry into effect the general intention of charity. But if a testator makes a bequest to trustees for such benevolent, religious, and charitable purposes, or for such charitable or public

¹ *Silcox v. Harper*, 32 Ga. 639.

purposes, as they should in their discretion approve of, the legacy cannot be supported, and the property devolves on the next of kin of the testator.¹ A charity will not be allowed to fail because of the misnomer of the corporation.² If the trusts are valid in point of law, neither the heirs nor any other private person can inquire into or contest the right of the corporation. It can only be done by the state.³ A misapplication of the income of a charity, made in good faith, and continued for many years, will not lightly be disturbed.⁴

§ 627. **Trustees.**—A municipal corporation may be a trustee, as a town or county.⁵ But neither the state nor the United States can be.⁶ Church-wardens may be trustees of a charity, though they are not a corporation capable by law of holding and conveying property.⁷ So may voluntary organizations, churches, societies, conferences, yearly meetings, etc.⁸ So may a corporation not yet in existence, or one to be formed for the purpose of executing the trust.⁹ Where the trust is valid, and the purposes lawful and definite, the courts will not permit it to

¹ Snell Eq. 110; citing *Morice v. Bishop of Durham*, 9 Ves. 399; 10 Ves. 522; *Ellis v. Selby*, 1 Myl. & C. 286; *Bates v. Eley*, L. R. 1 Ch. Div. 473; and other cases. And see *Jackson v. Phillips*, 14 Allen, 539; *McLain v. School Directors*, 51 Pa. St. 199; *Gilmer v. Stone*, 120 U. S. 586.

² *State v. Smith*, 16 Lea, 662.

³ *Wade v. Am. Col. Ass.*, 7 Smedes & M. 663; 45 Am. Dec. 325.

⁴ *Att'y-Gen. v. Society*, 13 Allen, 474.

⁵ *Philadelphia v. Fox*, 64 Pa. St. 169; *Vidal v. Girard*, 2 How. 127; *Fellows v. Miner*, 119 Mass. 541; see *Mason v. Trustees etc.*, 27 N. J. Eq. 47; *County of Lawrence v. Leonard*, 83 Pa. St. 206; *Commissioners v. Rogers*, 55 Ind. 297; *De Bruler v. Ferguson*, 54 Ind. 549; *Bell Co. v. Alexander*, 22 Tex. 350; 73 Am. Dec. 269.

⁶ *In re Fox*, 52 N. Y. 530; 94 U. S. 315; *Levy v. Levy*, 33 N. Y. 97.

⁷ *Burrill v. Boardman*, 43 N. Y. 542; 3 Am. Rep. 694; *Mason v. Methodist Church*, 27 N. J. Eq. 47; *Sohier v. St. Paul's Church*, 12 Met. 250.

⁸ 2 *Perry on Trusts*, 730; *Bartlet v. King*, 12 Mass. 536; 7 Am. Dec. 99; *Burbank v. Whitney*, 24 Pick. 146; 35 Am. Dec. 312.

⁹ *Inglis v. Sailor's Snug Harbor*, 3 Pet. 99; *Zimmerman v. Anders*, 6 Watts & S. 218; 40 Am. Dec. 552. "A devise to a corporation to be created by the legislature is good as an executory devise. A distinction is taken between a devise *in presenti* to persons incapable, and a devise *in futuro* to an artificial being, to be created and enabled to take"; *Angell and Ames on Corporations*, sec. 184; *Porter's Case*, 1 Coke, 24; *Attorney-General v. Bowyer*, 3 Ves. 714; *Inglis v. Sailor's Snug Harbor*, 3 Pet. 115-120, 144; *Sanderson v. White*, 18 Pick. 356"; *Ould v. Washington Hospital*, 1 McAr. 541; 29 Am. Rep. 605.

fail for want of a trustee.¹ Although trustees may have intermingled funds held by them upon distinct trusts, some of which are charitable and others in the nature of religious uses, but not strictly charitable, the funds of the latter will not be forfeited to the charities for the failure to keep them separate; but where there is evidence by which the amount of each fund can be approximately ascertained, the court will determine as accurately as possible the amount to which each is entitled.² If a testator gives his property to such person (upon trust) as he shall hereafter name to be his executor, and afterwards he appoints no executor; or if an estate is devised (upon trust) to such person as the executor shall name, and no executor is appointed; or if, an executor being appointed, he dies in the testator's lifetime, and no other is appointed in his place;—in all these cases, if the bequest be in favor of a charity, a court of equity will assume the office of an executor, and carry into effect that bequest.³ A bequest to a corporation in trust for charitable uses, though at testator's death the corporation had no legal capacity to take, may take effect as an executory devise, whenever, by subsequent incorporation, capacity is acquired.⁴ Trustees of a charitable bequest may become incorporated, though the will does not expressly provide for their incorporation where the object of the gift is in its nature lasting, and it is obviously in accord with the testator's intention that there should be perpetual succession.⁵ An unincorporated association is incapable as such to take a gift of real or personal property

¹ *Att'y-Gen. v. London*, 3 Brown Ch. 171; *Att'y-Gen. v. Sturge*, 19 Beav. 597; *Zeisweiss v. James*, 63 Pa. St. 468; 3 Am. Rep. 558; *Fellows v. Miner*, 119 Mass. 541; *Grimes v. Harmon*, 35 Ind. 198; 9 Am. Rep. 690; *McGirr v. Aaron*, 1 Penr. & W. 49; 21 Am. Dec. 361; *Meth. Epis. Church v. Mayor of Hoboken*, 33 N. J. L. 13; 97 Am. Dec. 696; *Hunt v. Fowler*, 121 Ill. 269.

² *Attorney-General v. Society*, 13 Allen, 474.

³ *Snell Eq. 113*; citing *Mills v. Farmer*, 1 Mer. 56; *Moggridge v. Thackwell*, 7 Ves. 36.

⁴ *McIntire v. Canal etc. Co.*, 9 Ohio, 203; 34 Am. Dec. 436.

⁵ *Sanderson v. White*, 18 Pick. 328; 29 Am. Dec. 591.

under a will for charitable purposes, where no trustees of the charity are directed or designated in the will.¹ A bequest to the respective treasurers, "for the time being," of the American Bible Society, and of other unincorporated societies, was sustained.²

ILLUSTRATIONS. — A will directed the executors to erect and transfer a church to the Presbyterian Church, provided a nucleus of a congregation could be found in the neighborhood. *Held*, that the church trustees, and not the executors, were to judge whether there were a sufficient number of persons to organize a church: *Swinney v. Fidelity Ins. Trust etc. Co.*, 15 Phila. 17. In pursuance of negotiations with an association known as "The Trustees of M. E. Church for Elgin Circuit," a deed was made to certain persons described as "Trustees of M. E. Church," who were with one exception trustees of such association, conveying land in trust "for the use of the ministry and membership of the Methodist Episcopal Church in the United States." *Held*, that no title passed, as the grantees did not take absolutely, and it did not vest by the statute of uses, as no beneficiaries are disclosed: *Little v. Willford*, 31 Minn. 173. A grant of land and personal property to A and his successors, in trust, "for the use and benefit of the Russell Institute of St. Louis, Missouri, for the purpose of founding an institution for the education of youth in St. Louis County, Missouri," with directions to the grantee to sell and pay over the proceeds "to Thomas Allen, president of the board of trustees of the said Russell Institute," *held*, a valid charitable trust, though no such institution was established or incorporated in the lifetime of the grantor or of Allen: *Russell v. Allen*, 107 U. S. 163.

§ 628. Proof of Beneficiary—Parol Evidence.—Where a beneficiary is mentioned by name, an association or corporation, though not of exactly the same name, may be allowed to take, its objects being the same, and in other respects it being clear that it was the beneficiary intended.³ A public seminary designated as a general object of charity by a testator must be understood to mean either a seminary or the seminary of his county, or

¹ *Downing v. Marshall*, 23 N. Y. 366; 80 Am. Dec. 291.

² *St. Luke's Home v. Indigent Females*, 52 N. Y. 191; 11 Am. Rep.

³ *Barr v. Smith*, 7 Vt. 241; 29 Am. Dec. 154.

any seminary which his executors or a court of equity, in the exercise of a sound discretion, may select as best adapted to effect the object of the charity.¹ Under a devise to an unincorporated church, the legal title descends to the heirs charged with the trust.² Parol evidence is admissible to remove a doubt as to which of several similar religious bodies was intended by the testator to be the object of his bounty.³ Where there is ambiguity in the language of a will, in designating the beneficiary of a charitable bequest, the bequest will not be defeated if the intended beneficiary can be identified.⁴

ILLUSTRATIONS.—After the taking effect of a will devising property to the "Catholic Church at the City of Lexington," a corporation was chartered with the name of that organization with reference to the will. *Held*, that the corporation did not acquire any right to the property: *Catholic Church v. Tobbein*, 82 Mo. 418. A testator directed the income of certain stocks to be paid over annually to the trustees of a certain school district, to be "by them expended in the education of poor children, or towards the maintenance of a good common school in said district." *Held*, a good charitable gift, not void for uncertainty, and intended for white children, the will having been made before the statute authorized the participation of colored children in the benefits of the common-school system: *Leeds v. Shaw*, 82 Ky. 79. A testator bequeathed certain property to "the missions and schools of the Episcopal Church about to be established at or near Port Cresson." The evidence showed that this mission was established by, and depended for support on, the Domestic and Foreign Missionary Society of the P. E. Church of the United States. *Held*, that the devise might be construed into a bequest to this last-named association: *Domestic and Foreign Missionary Soc.'s Appeal*, 30 Pa. St. 425. A testator bequeathed the residue of a certain trust fund or property, after the payment of certain pecuniary legacies, to six charitable societies, mentioning each by name. *Held*, that they were intended to take as tenants in common, and not as joint tenants; and therefore the shares intended for one or more of the societies that proved incompetent to take could not be taken,

¹ *Curling v. Curling*, 8 Dana, 38; 33 Am. Dec. 476.

² *Byers v. McCartney*, 62 Iowa, 339.

³ *Howard v. American Peace Soc.*,

49 Me. 288; *Brewster v. McCall*, 15 Conn. 274; *Roy v. Rowzie*, 25 Gratt. 599; *Gilmer v. Stone*, 120 U. S. 586.

⁴ *First Baptist Church v. Robberson*, 71 Mo. 326.

under the will or otherwise, by those societies that were competent to take: *White v. Howard*, 52 Barb. 294. A testator bequeathed the residue of his estate "equally to the authorized agents of the Home and Foreign Missionary societies, to aid in propagating the holy religion of Jesus Christ." *Held*, that extrinsic evidence of the facts known to the testator at the time he executed the will, the names by which the missionary societies were called by him, and the religious society with which he worshiped, his interest in any particular missionary society, and the contributions which he made for missionary purposes, was admissible to identify the societies intended: *Hinckley v. Thatcher*, 139 Mass. 477; 52 Am. Rep. 719. A testator devised and bequeathed the whole of his estate, both real and personal, to his wife for life, and "after her death, to the Methodist Church of which she might be a member at the time of her death, to be appropriated to the uses and purposes which the conference might deem most advantageous for said church more especially," etc. *Held*, that the particular congregation of which the wife was a member at her death was exclusively entitled to the bounty, and not the Methodist Church in its general connec-tional character; and it was referred to a master to report a scheme for the proper administration of the charitable uses so created, receiving proposals from all parties interested: *Attorney-General v. Jolly*, 2 Strob. Eq. 379. A testatrix bequeathed a legacy to the treasurer "of the society for the propagation of the Gospel among the Jews," in aid of the general purposes of that society. There was not any society with this exact name, but there were two societies for the purpose indicated in the description, namely, "The London Society for Promoting Christianity among the Jews," and "The British Society for the Propagation of the Gospel among the Jews." *Held*, 1. That there was an equivocal description of the society to be benefited, so as to render evidence of intention admissible; and 2. That the fact that the testatrix had, on one occasion, subscribed to the London society was sufficient to turn the scale in favor of that society: *Feam's Will*, 27 Week. Rep. 392. A will provided a devise and bequest to the city of Baltimore, in trust for the McDonogh Educational Fund and Institute. There was no such corporation, but there was an organization under an ordinance of the city of Baltimore called "Board of Trustees of the McDonogh Educational Fund and Institute," and supported by funds from McDonogh's estate, which carried on a "school-farm," known as the McDonogh Institute. *Held*, that the trust was sufficiently certain, and was valid: *Barnum v. Mayor of Baltimore*, 62 Md. 275; 50 Am. Rep. 219. A testator provided a trust of personalty, "the income to be devoted to the education of the freedmen, and paid over annually to the

proper officers of the Freedmen's Association for that purpose by the trustee." There was no organization bearing that name. He also gave his real estate to his executor, to be sold, the proceeds to be held in trust, and the income paid in like manner, "or disposed of as he pleases." *Held*, 1. That evidence was inadmissible to show that the testator told the draughtsman of the will that he intended the freedmen's association organized by the Methodists of Cincinnati; 2. That the trustee could not appropriate the income to the education of the freedmen as a class; 3. That the devise, as well as the bequests, wholly failed: *Fairfield v. Lawson*, 50 Conn. 501; 47 Am. Rep. 669. A testator gave a legacy to "The American and Foreign Bible Society." There was a corporation of that name, under the management of the Baptist denomination. There was another, earlier incorporated, named "The American Bible Society," under the management of the Congregationalists and Presbyterians. The latter was sometimes called by the former name, but it did not appear that it was as well known by that name as the former society, or that the testator had ever called it or heard it called by that name. The testator attended the Congregationalist church, and had no especial sympathy with the Baptist denomination. Both societies solicited contributions in the testator's neighborhood. *Held*, that evidence was inadmissible to show that the testator said to the scrivener, while drawing the will, that he wished to give the money to the Bible society sustained by the Congregationalists and Presbyterians, and that he was not sure of its corporate name, but believed it was "The American and Foreign Bible Society": *Dunham v. Averill*, 45 Conn. 61; 29 Am. Rep. 642.

§ 629. **Certainty and Definiteness in Object.**—As has been said, the court will go far in carrying out a trust for charity, even where the object has not been stated with preciseness by the testator.¹ Uncertainty in the object is one of the characteristics of a charitable use, because if the beneficiaries are defined with precision, the ordinary doctrine of equity would be sufficient to support it. "A trust for a charity which is declared with the same certainty in all respects as ordinary trusts is, of course, capable of being sustained by the ordinary rules of property,"²

¹ *Ante*, sec. 626.

South Society v. Crocker, 119 Mass.

² *Liley v. Hey*, 1 Hare, 580; *Old* 1; 20 Am. Rep. 299.

but a trust which, according to those rules, would fail for uncertainty, is upheld in chancery, when the beneficiaries are objects of charity, and is then a charitable use."¹ But the trust must not be so uncertain and indefinite as not to be able to be executed. If a "charity does not fix itself on a particular object, but is general and indefinite, and no plan or scheme is prescribed, and no discretion is given in the will to select the beneficiaries, it does not admit of judicial administration." In addition to a definite class, the "will itself should prescribe some mode of selection, or give some person a discretionary power to select."² The uncertainty which will render the trust void may be in the amount given,³ but it is usually in the object or in the donee.⁴ A dedication to religious or public uses may be sustained, though there is no certain grantee, and may be limited only by the wants of the community. A dedication may be for a limited period, or during the pleasure of the person making it.⁵

The following bequests and devises have been held void for uncertainty: For "feeding, clothing, and educating the poor children belonging to the congregation" of a certain church;⁶ to the Roman Catholic orphans of the diocese of La Crosse;⁷ to a person, "to use and appro-

¹ *Bispham's Equity*, sec. 116; *Jackson v. Phillips*, 14 Allen, 550; *Perry on Trusts*, sec. 687; *Beerman v. Bonser*, 23 N. Y. 298; 80 Am. Dec. 269.

² *Fairfield v. Lawson*, 50 Conn. 513; 47 Am. Rep. 669; *Grimes's Ex'r v. Harmon*, 35 Ind. 198; 9 Am. Rep. 690; *Beardsley v. Selectmen*, 53 Conn. 491; 55 Am. Rep. 152; *White v. Fisk*, 22 Conn. 53; *Reformed Dutch Church v. Mott*, 7 Paige, 77; 32 Am. Dec. 613; *Inglis v. Sailor's Snug Harbor*, 3 Pet. 99; *Kain v. Gibboney*, 101 U. S. 362; *Wheeler v. Smith*, 9 How. 55; *Bridges v. Pleasants*, 4 Ired. Eq. 26; 44 Am. Dec. 94; *Fontain v. Ravenel*, 17 How. 368; *Beekman v. Bonser*, 23 N. Y. 298; 80 Am. Dec. 269.

³ *Hartshorne v. Nicholson*, 26 Beav. 58; *Flint v. Warren*, 15 Sim. 626; *Ewen v. Banneman*, 2 Dowl. & C. 64.

Where a certain sum is given for several purposes, and the specific amount for each is not expressed, the money will be equally divided among the objects named: *Att'y-Gen. v. Doxley*, 2 Eq. Cas. Abr. 194; *Penny v. Turner*, 2 Phil. 493; *Sandsbury v. Denton*, 3 Kay & J. 529; *Mills v. Farmer*, 1 Mer. 55; *Moggridge v. Thackwell*, 3 Bro. C. C. 517.

⁴ *Owens v. Missionary Soc.*, 14 N. Y. 380; 67 Am. Dec. 160.

⁵ *Antones v. Eslava*, 9 Port. (Ala.) 527.

⁶ *Dashiell v. Att'y-Gen.*, 5 Har. & J. 392; 9 Am. Dec. 572.

⁷ *Heiss v. Murphy*, 40 Wis. 279, the court saying: "It is admitted that the intention of the testator is to control in administering charitable trusts. But if that intention has been so

priate for religious and charitable purposes and objects, in such sums and in such manners as will, in his judgment, best promote the cause of Christ";¹ to distribute to such persons, societies, or institutions as the executors may consider most deserving;² "for any and all benevolent purposes that he [the trustee] may see fit";³ to distribute the same "among such incorporated societies organized under the laws of the state of New York or the state of Maryland, having lawful authority to receive and hold funds upon permanent trusts for charitable or educational uses," as the executors or the survivors might select, and in such sums as they should determine;⁴ to build a free school-house, and extend the education of poor children;⁵ granting land for a burying-ground on trust that the trustee shall at all times permit all the white religious societies of Christians and the members of such societies to use the land as a common burying-ground, and for no other purpose;⁶ to the testator's "next of kin who may be needy";⁷ to be distributed among needy and respectable widows;⁸ a devise to the city of Baltimore of certain

vaguely and imperfectly expressed that the *ceſui que trust* cannot be ascertained, the charity must fail. In this case it is impossible to determine from the language of the will who are the objects of the testator's bounty. There are no ascertainable beneficiaries, either as a class or individuals, and therefore the trust cannot be effectually carried. It is uncertain whether the word 'orphan' applies to those children who have lost both parents, or whether it does not include as well those who have only lost one. It is impossible to determine whether the testator intended to restrict his bounty to such of either or both classes as were residents of the diocese at the time of his death, or whether he intended the fund should be used as well for the benefit of any that might thereafter come to the diocese, or become orphans by the death of one or both resident parents. No power is given the trustee to select the individuals from any certain or definite

class, so as to render 'uncertainty certain, and relieve the devise and bequest from the objection arising out of its vague and indefinite character.' It seems to us that a trust so wanting in all the elements of certainty and precision cannot be enforced by a court acting only in the exercise of purely judicial power."

¹ *Maught v. Getzendanner*, 65 Md. 527; 57 Am. Rep. 352.

² *Nichols v. Allen*, 130 Mass. 211; 39 Am. Rep. 445.

³ *Adye v. Smith*, 44 Conn. 60; 26 Am. Rep. 424.

⁴ *Prichard v. Thompson*, 95 N. Y. 76; 47 Am. Rep. 9.

⁵ *Stonestreet v. Doyle*, 75 Va. 356; 40 Am. Rep. 731.

⁶ *Brown v. Caldwell*, 23 W. Va. 187; 48 Am. Rep. 376.

⁷ *Fontaine v. Thompson*, 80 Va. 229; 56 Am. Rep. 589.

⁸ *Gallego v. Att'y-Gen.*, 3 Leigh, 450; 24 Am. Dec. 660.

annuities, in trust, that the said annuities shall annually forever be distributed, under the direction of said corporation, to the relief and support of the indigent and necessitous poor persons who may, from time to time, reside within the limits, as now known, of the twelfth ward of said city;¹ a bequest of property to W., "Roman Catholic bishop of Wheeling, Virginia, or his successor in said dignity, who is hereby constituted a trustee for the benefit of the community" (an unincorporated association known as the "Sisters of St. Joseph," and previously described as a religious community attached to the Roman Catholic Church), the same "to be expended by the said trustee for the use and benefit of said community";² for the building of a "boys' reformatory";³ to the "most deserving poor of the city of N.";⁴ "I authorize my executrix to disburse from my estate, to such worthy persons and objects as she may deem proper, such sums as it is her pleasure thus to appropriate, not to exceed in all five thousand dollars";⁵ where it is given, "to be applied to foreign missions and to the poor saints, this to be disposed of and applied as my executor may think the proper objects according to the Scriptures, the greater part, however, to be applied to missionary purposes";⁶ a bequest to executors of personalty, "to be by them applied for the purpose of having prayers offered in a Roman Catholic church, to be by them selected for the purpose of the testator's soul, and the souls of his family, and also for the souls of all other persons who may be in purgatory";⁷ a bequest, after giving the income of three quarters of a sum to certain charities, directing the testator's wife to dispose of the income of the remaining quarter "for such charitable purposes as she may deem proper";⁸ a con-

¹ *Wildeman v. Baltimore*, 8 Md. 551.

² *Kain v. Gibboney*, 3 Hughes, 397; 101 U. S. 397.

³ *Hughes v. Daly*, 49 Conn. 34.

⁴ *Id.*

⁵ *Bristol v. Bristol*, 53 Conn. 242.

⁶ *Bridges v. Pleasants*, 4 Ired. Eq. 26; 44 Am. Dec. 94.

⁷ *Holland v. Alcock*, 108 N. Y. 312; 2 Am. St. Rep. 421.

⁸ *Bristol v. Bristol*, 53 Conn. 242.

veyance to five persons in trust, the property to be kept as a place of divine worship for the use of the "ministry and membership" of the Methodist Episcopal Church;¹ a bequest in trust to inclose the Mt. Pleasant church and grave-yard;² a bequest in trust to purchase a parsonage for Mt. Pleasant church, for the Presbyterian Sunday school at Union, and for the home missions of the Presbyterian Church;³ a bequest to the poor of a certain city which has no paupers nor poor-fund,—the will disclosing no method for ascertaining the persons intended;⁴ where the will directs real estate to be sold, and the proceeds to be laid out in building convenient places of worship free for the use of all Christians who acknowledge the divinity of Christ and the necessity of spiritual regeneration;⁵ where a legacy for a pious use was given to a corporation, having for its general object, as shown by its name, the same purposes as the legacy proposed, but there was no corresponding authority given, nor any specific use or object for which the corporation was authorized to take and hold property;⁶ a residuary legacy "to the Methodist General American Missionary Society appointed to preach the Gospel to the poor," a society not incorporated until after the testator's death;⁷ a legacy given to a religious corporation, not for its own use, but to be held in trust for the use and benefit of necessitous Methodist churches in the United States;⁸ for the "propagation of the Gospel in foreign lands."⁹

The following trusts for charity have been held not uncertain: For the support, by limited weekly installments, of poor widows having no certain income, and women deserted by their husbands without just cause, of the age

¹ *Isaac v. Emory*, 64 Md. 333.

² *Wilson v. Perry*, 29 W. Va. 169.

³ *Id.*

⁴ *Hoffen's Estate*, 70 Wis. 522.

⁵ *White v. Attorney-General*, 4 Ired. Eq. 19; 44 Am. Dec. 92.

⁶ *Andrew v. Bible Soc.*, 4 Sand. 156.

⁷ *Owens v. Missionary Soc.*, 14 N. Y. 380; 67 Am. Dec. 160.

⁸ *Church Extension v. Smith*, 56 Md. 362.

⁹ *Carpenter v. Millar*, 3 W. Va. 174; 100 Am. Dec. 744.

of fifty years and upwards, and of irreproachable character, having had residence for a specified time within a town named;¹ for the purchase and distribution of such religious books or reading as the trustees shall deem best;² to the support and management of such worthy and meritorious, charitable and educational, and religious institutions of the Roman Catholic faith as the trustee may determine;³ to such charitable institution for women in Chicago as she may select;⁴ a bequest to "be used at discretion by the acting selectmen of B., for the special benefit of the worthy, deserving, poor, white, American, Protestant, Democratic widows and orphans, residing in B., until all is expended";⁵ "to divide said remainder among such charitable institutions in St. Louis as he shall deem worthy";⁶ to the New York yearly meeting of Friends, called orthodox, for the use of its ministers in straightened circumstances;⁷ that the executor invest the residue of the estate "as he may deem best, as a fund, the annual interest of which shall be applied for the benefit of the sabbath school library of the First Baptist Church in S., or the Baptist Home Missionary Society, whichever may be deemed most suitable";⁸ "to apply" a portion of the testator's estate "to such charitable institutions which are under Protestant management as my said executors may choose";⁹ for the building of a Catholic convent in N.;¹⁰ for such charitable institutions as the trustee shall select;¹¹ for the benefit of the poor members of two churches;¹² to form a fund, and to pay the income thereof "to poor families, widows and orphans, new-com-

¹ *De Bruler v. Ferguson*, 54 Ind. 549.

² *Simpson v. Welcome*, 72 Me. 496; 39 Am. Rep. 349.

³ *Quinn v. Shields*, 62 Iowa, 129; 49 Am. Rep. 141.

⁴ *Mills v. Newberry*, 112 Ill. 123; 54 Am. Rep. 213.

⁵ *Beardsley v. Bridgeport*, 53 Conn. 489; 55 Am. Rep. 152.

⁶ *Howe v. Wilson*, 91 Mo. 45; 60 Am. Rep. 227.

⁷ *Shotwell v. Mott*, 2 Sand. Ch.

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⁸ *Fairbanks v. Lamson*, 99 Mass. 533.

⁹ *Gumble v. Pfuger*, 62 How. Pr. 118.

¹⁰ *Hughes v. Daly*, 49 Conn. 34.

¹¹ *In re Hagenmeyer's Will*, 12 Abb. N. C. 432.

¹² *Union Meth. Episcopal Church v. Wilkinson*, 36 N. J. Eq. 141.

ers in distress, or persons in the county suffering from want of clothing, food, or fuel, especially in the winter; not to drunkards, but to their suffering families, if worthy; not to companies or corporations, unless formed for the relief of the poor; not to churches, but to those in distress";¹ for the benefit of indigent unmarried Protestant females over eighteen;² to aid indigent young men in fitting themselves for the evangelical ministry;³ in trust, to be divided by the trustee among such charitable institutions in a certain city as he shall deem worthy;⁴ "to the poor and needy, fatherless, etc.," of two designated townships, "to such poor as are not able to support themselves, to be divided as my executors may deem proper, without any partiality";⁵ a bequest to the mayor and council of Philadelphia, in trust, the income to be "annually forever expended in planting and renewing shade trees, especially in situations now exposing my fellow-citizens to the heat of the sun";⁶ a bequest to "the suffering poor of the town of A.," no trustee to execute the trust being named in the will;⁷ a testamentary trust of property, to be divided by the executors "among such Roman Catholic charities, institutions, schools, or churches in the city of New York," as the majority should select, and "in such proportions as they should think proper";⁸ bequests to certain persons "for the promotion of true evangelical piety and religion," to be distributed by the trustees in such divisions, and to such societies and religious charitable purposes as they may think fit and proper;⁹ where a testator empowers his executors to sell his estate, and directs a certain portion of it to be con-

¹ *Erskine v. Whitehead*, 84 Ind. 357.

² *Tappan's Appeal*, 52 Conn. 412.

³ *Storr's Agricult'l School v. Whitney*, 54 Conn. 342.

⁴ *Howe v. Wilson*, 91 Mo. 45; 60 Am. Rep. 226.

⁵ *Urney's Executors v. Wooden*, 1 Ohio St. 160; 59 Am. Dec. 615.

⁶ *Cresson's Appeal*, 30 Pa. St. 437.

⁷ *Howard v. Society*, 49 Me. 283.

⁸ *Power v. Cassidy*, 79 N. Y. 602; 35 Am. Rep. 550.

⁹ *Going v. Emery*, 16 Pick. 107; 26 Am. Dec. 645.

verted into a fund "for educating some poor orphans," of a particular county, "to be selected by the county court who are the guardians of such, and to be confined to such as are not able to educate themselves," such fund to be loaned out at interest, and rendered "a perpetual fund," and the interest only so applied;¹ a conveyance of real and personal property in trust, "for the purpose of founding an institution for the education of youth in St. Louis County, Missouri," directing the proceeds of the property to be paid over as often as once a year to the president of the board of trustees of the said institution, and his receipt to be a full discharge of the trustee, and prescribing the manner in which the trustee was to execute his trust;² "to employ the annual income of the said moneys so invested, and from time to time to be invested for the relief of the most deserving poor of the city of Paterson, afore-said, forever, without regard to color or sex; but no person who is known to be intemperate, lazy, immoral, or undeserving, to receive any benefit from said fund";³ a devise of land to the Presbyterian church of a town, to sustain and maintain Presbyterian preaching in the place, to advance and promote, as far as practicable, the educational interests of said church, empowering the church session to use the income, first to pay any balance of salary, and to apply the surplus to such educational purposes in connection with the church as they might deem advisable, authorizing the improvement of the land, and prohibiting its sale for twenty-five years from the death of the last life tenant;⁴ a sum of money, bequeathed to be kept as a perpetual fund for the use of a religious society, one half the income to be used in defraying the expenses of the society, "and the balance distributed and used for the relief of the resident poor";⁵ a bequest to an incorporated

¹ Moore v. Moore, 4 Dana, 354; 29 Am. Dec. 417.

⁴ Andrews v. Andrews, 110 Ill. 223.

² Russell v. Allen, 5 Dill. 235.

⁵ Webster v. Morris, 66 Wis. 366;

³ Heaketh v. Murphy, 35 N. J. Eq. 23. 57 Am. Rep. 278.

church, directing that the income should be used for an unincorporated Sunday school, which was an integral part of the church organization;¹ a bequest to a religious society, "to help in the support of preaching, so long as such is kept up as at present";² a devise, without the interposition of a trustee, for investment and the distribution of the income "among the worthy poor of the city of L., in such manner as a court of chancery may direct."³

ILLUSTRATIONS. — A bequest was made to a voluntary and unincorporated body of persons, described as the "Arcot Mission." *Held*, invalid for want of a capable legatee: *Sherwood v. American Bible Society*, 4 Abb. App. 227. A testator, resident in the United States, left half his money to be used in erecting a building in the suburbs of Malaga, Spain, "to be under the patronage and care of the city authorities," and to be used as an orphan asylum and school, etc. The other half of his money testator left as an endowment fund. *Held*, a valid devise to a charity, and that the city was sufficiently designated as the trustee: *Peynado v. Peynado*, 82 Ky. 5. A testatrix left, by her will, land to the trustees of a certain church, upon the following conditions: that the trustees should annually appropriate out of the profits of the land a certain sum for churches in destitute and needy localities of a certain denomination in the state; that neither they nor any of the officers of said church should alter its pulpits or galleries, or alienate the lot on which the sabbath school stood; that they should keep her lot in a certain cemetery in order, which she also bequeathed to the said trustees. *Held*, that the devise was not void for uncertainty; that the conditions not to alter the pulpit and galleries, and not to alien the sabbath school lot, did not render the bequest void; that relating to the pulpit, etc., being a proper charity, and the others being conditions subsequent, which could not affect a charitable gift; and that the church was capable of executing the trust: *Jones v. Habersham*, 3 Woods, 443. A deed inartificially drawn purported to convey land to the grantees "as feoffees in trust for the purpose and use of erecting thereon a suitable building for a school-house on the Lancaster plan of education, and also for a meeting-house for divine worship." *Held*, to create a charitable use, although not making it the duty of the feoffees to erect the building, nor providing

¹ *Kutaw Place Baptist Church v. Shively*, 67 Md. 493.

² *King v. Grant*, 55 Conn. 166.

³ *Hunt v. Fowler*, 121 Ill. 269.

any fund therefor: *Meeting Street Baptist Society v. Hail*, 8 R. I. 234. A testator directed that the income from certain property should be applied to the support of indigent theological students of a specified class, in sums not exceeding one hundred to one hundred and fifty dollars per annum to each student. There proved to be not students enough of the class specified to exhaust the income. *Held*, that the purposes of the charity should be carried out by increasing the amount payable to each beneficiary: *Theological Educational Society v. Att'y-Gen.*, 135 Mass. 285. A testator, living in Massachusetts, directed that the income of a certain fund should be paid annually by trustees acting under the will "to such person or persons as shall from time to time be appointed by the judge of probate for the time being" in a district in Connecticut, "to take, receive, and distribute the same among the poor meritorious widows living and belonging within the limits of" an ecclesiastical society of a town in the above district. He further directed that if, from any cause, it should appear that the objects for which the fund was created could not be accomplished, or that the income of the same was not applied conformably to the provisions of the will, the fund should lapse into and become part of the residue of the estate. In 1872, the fund having accumulated to the amount required by the will, the trustees made oral application to the judge of probate accordingly. No notice thereof was given to the society, or to any of the beneficiaries named, and the judge declined to act, on the ground of want of jurisdiction. Five years afterwards the then judge of probate, upon the filing of a certified copy of the will, appointed an almoner under the provisions in question. In the following year, the legislature of Connecticut confirmed the appointment, and gave express power to the judge of probate in the premises. *Held*, that the charitable request was valid, and had not been defeated by the delay in the appointment of an almoner: *Sohier v. Burr*, 127 Mass. 221.

§ 630. **The Doctrine of Cy-pres.**—Where the literal execution of the trusts of a charitable gift is impracticable, the English court of chancery will execute them *cy-pres*, i. e., as near as can be to the original purpose.¹ Thus

¹ *Moggridge v. Thackwell*, 7 Ves. 69, Lord Eldon saying that if the testator has manifested a general intention to give to a charity, the failure of the particular mode in which the charity is to be effectuated shall not destroy the charity; but if the substantial in-

tention is charity, the law will substitute another mode of devoting the property to charitable purposes, though the formal intention as to the mode cannot be accomplished. And see *Hinckley's Estate*, 58 Cal. 457.

where there was a bequest of the residue of the testator's estate to a company to apply the interest of a moiety "unto the redemption of British slaves in Turkey and Barbary," one fourth to charity schools in London and its suburbs, and one fourth towards poor and destitute freemen of the company, there being no British slaves in Turkey and Barbary, the court directed a new scheme to be framed *cy-pres*, and approved of a scheme which gave the moiety thus undisposed of to the donees of the other fourth parts.¹ In a recent case it was held that a gift "for the relief and use of the poorest of my kindred" must, to be a charitable gift, be construed as a gift for the benefit of those who are really poor, and not of those who are the least wealthy, and that after providing for the relief of the needy kindred of the testator, the surplus was applicable to charitable objects generally.² The doctrine of *cy-pres* is only applicable where the testator has manifested in his will a *general* intention of charity, and therefore will not be applicable when such general intention is not to be found. If, therefore, it is clearly seen that the testator had but one *particular* object in his mind, as, for example, to build a church at W., and that purpose cannot be answered, the next of kin will take.³ Courts have adopted and administered charities upon *cy-pres* principles only with the view of sustaining and carrying into effect the intention of the donor, but have no authority to change the object or place because the fund could be more efficiently or judiciously applied in another place or to a different object.⁴ A bequest to the city in-

¹ Attorney-General v. Ironmongers' Co., 2 Beav. 313.

² Attorney-General v. Duke of Northumberland, 26 Week. Rep. 586.

³ Clark v. Taylor, 1 Drew, 642; Loscombe v. Wintringham, 13 Beav. 87.

⁴ Gilman v. Hamilton, 16 Ill. 225.

In a Missouri case it was held that equity has power to decree a sale of real estate conveyed jointly to two charitable institutions, for the pur-

pose of erecting a building thereon for their joint use, and to authorize each society to use its portion of the proceeds of sale in the erection of a separate building for its own purposes, it being impracticable, from the location and surroundings of the property, to build on and use it jointly, as intended by the donor: Missouri Historical Soc. v. Academy of Science, 94 Mo. 459.

sane asylum, wherein the insane of the city alone are cared for, cannot be expended for the benefit of the state asylum, wherein the insane of the whole state are cared for, even though the city insane have been removed from the former to the latter.¹

The *cy-pres* doctrine has been rejected in a number of cases in this country, principally on the ground that the jurisdiction of the English chancellor to apply the gift or bequest to a public charity, the object failing, did not belong to him as a court of equity, nor was it part of his judicial power, but was a branch of the prerogative power of the king as *parens patriæ*, exercised by him through the chancellor.² The courts of New York do not exercise the power of *cy-pres*. If a testator leaves property to "some Sunday school," the court will not designate a beneficiary.³ In a Massachusetts case, the testator, a resident of Boston, bequeathed two sums of money in trust, one to be used in "the preparation and circulation of books, newspapers, the delivery of speeches, lectures, and such other means as in their [the trustees'] judgment will create a sentiment that will put an end to negro slavery in this country," and the other "for the benefit of the fugitive slaves which may escape from the slave-holding states." Slavery having been abolished after the testator's death, it was held that the trust was not destroyed, and the supreme court ordered the first sum to go to an association to promote the education of the freedmen, and the

¹ Vance's Succession, 36 La. Ann. 559.

² Fontain v. Ravenel, 17 How. 369; Carter v. Balfour, 19 Ala. 814; Williams v. Pearson, 38 Ala. 299; Adye v. Smith, 44 Conn. 60; 26 Am. Rep. 424; Adams v. Bass, 18 Ga. 130; Grimes v. Harmon, 35 Ind. 198; 9 Am. Rep. 690; Curling's Adm'rs v. Curling's Heirs, 8 Dana, 38; 33 Am. Dec. 475; Cromie v. Louisville Orphan House, 3 Bush, 371; Bascom v. Albertson, 34 N. Y. 590; Beekman v. Bonson, 23 N. Y. 298; 80 Am. Dec. 269;

Bridges v. Pleasants, 4 Ired. Eq. 26; 44 Am. Dec. 94; McAuley v. Wilson, 1 Dev. Eq. 276; 18 Am. Dec. 587; Heiss v. Murphy, 40 Wis. 292; Meth. Church v. Remington, 1 Watts, 218; 26 Am. Dec. 61; Gallego v. Attorney-General, 3 Leigh, 450; 24 Am. Dec. 650; Shields v. Jolly, 1 Rich. Eq. 99; 42 Am. Dec. 347; Lapage v. McNamara, 5 Iowa, 124; Williams v. Williams, 8 N. Y. 525; Holland v. Alcock, 108 N. Y. 312; 2 Am. St. Rep. 420.

³ In re Reid, 3 Demarest, 603.

second to the use of needy Africans in Boston and vicinity, preference being given to those that had escaped from slavery.¹

ILLUSTRATIONS.—A clause in a will, "the residue of my estate to be kept in reserve for further consideration in the way of charitable purposes in a liberal way, not to any particular creed or sect of religion," *held*, to be a gift of the residue to the executors by implication, for such charitable purposes as they may think proper: *Claypool v. Norcross*, 42 N. J. Eq. 545. A will directed that a charter be procured for an industrial home for orphan girls, where they should be fitted for employment in stores, or for seamstresses, or domestics, or for any analogous occupations. The testator's scheme contemplated that the corporation should be controlled in part by women. *Held*, that a charter which made a training school for nurses the primary object of the home, and which, in effect, excluded women from the control, was not in accordance with the will, and was therefore properly disapproved: *Vaux's Appeal*, 109 Pa. St. 497. A will bequeathed a sum to the "Nursery," without other designation. There was no corporation then having that name, but the fund was claimed by four charitable corporations. The first was originally incorporated as the "P. Nursery," but after seven years its name was changed to the "R. I. C. Hospital and Nursery of P." Its object was the care of infants under the age of three years, and it was commonly called the "Nursery." For lack of funds it ceased to work, and transferred its property and the children under its care to an orphanage. The testator called the orphanage the "Nursery," as did others, and contributed to it, saying that it was the same thing, shortly before executing his will. The orphanage maintained the "Nursery" in connection with its other work, and kept half its children in its building. *Held*, that the orphanage was entitled to the fund, to be used for the benefit of the "Nursery": *Wood v. Hammond*, R. I. 1888.

§ 631. Legality of Object.—A bequest for a purpose prohibited by or opposed to the existing laws, or for the purpose of bringing about changes in the laws or political institutions of the country, is not charitable.² The rule

¹ *Jackson v. Phillips*, 14 Allen, 539; and see *Moore v. Moore*, 4 Dana, 354; 29 Am. Dec. 417; *Phila. v. Girard*, 45 Pa. St. 28; 84 Am. Dec. 470; *Attorney-General v. Jolly*, 1 Rich. Eq. 99; *Gilman v. Hamilton*, 16 Ill. 231.

² *Jackson v. Phillips*, 14 Allen, 580; and see *Hutchins v. George*, 44 N. J. Eq. 124, where the court of chancery refused to sustain a bequest for the distribution of the works and writings of Henry George.

against perpetuities does not apply to charities, and if a devise is made to one charity in the first instance, and then over, upon a contingency which may not take place within the limit of that rule, to another charity, the limitation over to the second charity is good.¹

§ 632. **Statutory Limitations.**—In several of the states (California, Georgia, Ohio, Pennsylvania, and New York among others) the statutes limit the amount that may be given or bequeathed to charities where the testator leaves certain heirs, and requires the deed or will to be made a certain time before death.² A bequest of “all the rest, residue, and remainder” of testator’s estate to a church, “to be expended in masses for the repose of my soul,” is a religious use within the Pennsylvania statute, and therefore void, if made within one calendar month of the death of the testator.³ The limitation of bequests for charitable purposes to one third of testator’s estate contained in California Civil Code means one third of the gross value of such estate, not the value after the payment of debts.⁴ A statutory provision that “no person having a wife or child shall devise to any charitable institution more than one fourth of his estate,” etc., does not apply to the case where such devise is only to take effect as a remainder after the death of such relative leaving no issue.⁵ Under the Pennsylvania statute, providing that no estate shall be bequeathed, devised, or conveyed to charities, “except by deed or will attested by two credible witnesses, . . . at least one calendar month before the decease of the testator or alienor,” it was held that where the testator made a bequest of his residuary estate to a charity more than a month before his decease, and within a month made a codicil diminishing the residue by several

¹ *Jones v. Habersham*, 107 U. S. 174.

² See 1 Stimson’s American Statute Law, 349.

³ *Rhymer’s Appeal*, 93 Pa. St. 142; 39 Am. Rep. 736.

⁴ *Hinckley’s Ex.*, Myrick’s Prob. 189.

⁵ *White v. Howard*, 52 Barb. 294.

specific bequests, the codicil did not so far republish the will as to invalidate the bequest to the charity.¹ The statute of Illinois, limiting the lands of any religious body to ten acres, applies only to lands held for purposes of worship, and not to those held by benevolent or missionary societies.² The statute of Pennsylvania invalidating conveyances or devises to a charity if made within a month of the donor's death, unless for a "fair, valuable consideration," includes a subscription toward the erection of a church, it not appearing that others subscribed or that work was undertaken on the faith of the subscription.³ The Wisconsin statute, by which "uses and trusts, except as authorized and modified in this chapter, are abolished," prohibits all trusts, including "charitable uses," except those specifically authorized and saved by the subsequent provisions of the chapter.⁴

ILLUSTRATIONS. — A testatrix desiring to leave her estate for charitable purposes, and being advised that she could not effect her design by direct testamentary provision, but only by absolute gift to individuals, in reliance upon their honor to carry out her purposes, gave the greater part of her estate to her lawyer, her doctor, and her priest, by will, absolutely as joint tenants, they promising to observe her instructions. She also signed a letter of instructions directing the bestowal of the estate on intermediate persons and charities of their selection in perpetuity. *Held*, 1. That the legatees took no absolute interest; 2. That the gifts to charity being repugnant to the statute against perpetuities, the estate was held in trust for the heirs and next of kin of the testatrix: *O'Hara v. Dudley*, 95 N. Y. 403; 47 Am. Rep. 53. A testator, by will, made a bequest of one thousand dollars to a charitable institution, and afterward, by a codicil, revoked the gift, and changed it to one of five hundred dollars. Two days after the execution of the codicil he died. *Held*, that under a statute which declares that a bequest for religious or charitable uses made within one month of the testator's death shall be absolutely void, the bequest of five hundred dollars was void: *Poulson's Estate*, 11 Phila. 151. S., a testator, wishing to bequeath his

¹ *Carl's Appeal*, 106 Pa. St. 635.

² *Gilmer v. Stone*, 120 U. S. 586.

³ *Reimensnyder v. Gans*, 110 Pa. St. 17.

⁴ *Ruth v. Oberbrunner*, 40 Wis. 238.

estate to charitable uses, was told that it would be invalid if he should die within a month, but that he might give it unconditionally to some person whom he could trust to carry out his wishes. Y., bishop of an evangelical association, was named, and an absolute bequest was made to him. S. died within the month, and Y., being informed of his death and wishes, said he would carry them out. *Held*, that the bequest was not within a statute prohibiting charitable bequests within a month of the testator's death: *Schultz's Appeal*, 80 Pa. St. 396.

§ 633. Privileges and Exemptions—Taxation.—The exemption of religious, charitable, educational, and such institutions from taxation is not unconstitutional.¹ And where a grant of property is made with a provision that it shall not be taxed, or where an institution is chartered by the state and exempted from taxation, this is a contract which cannot be afterwards imposed.² An act declaring that all estates granted for any religious, educational, or charitable uses shall forever remain to such uses, and shall also be exempt from the payment of rates, is not a contract between the state and the grantor or grantees; and a subsequent act taxing such of those estates as have been leased or conveyed in such a manner as to yield no longer an annual income for such use is valid.³ The exemption from taxation of the property of charitable or religious institutions extends only to taxation for the general purposes of government, and not taxation for local improvements.⁴ An exemption from "taxation of

¹ *Brainard v. Colchester*, 31 Conn. 407; *San Francisco Ladies' etc. Soc. v. Story*, 32 Cal. 65; *Griswold College v. State*, 46 Iowa, 275. It is not in conflict with the constitutional provision that "the general assembly shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof, nor shall any person be compelled to attend any place of worship, pay taxes, tithes, or other rates for building or repairing places of worship, or the maintenance of any minister or ministry"; *Griswold College v. State*, 46 Iowa, 275. A foreign corporation will not, however, take the benefit of

such an exemption: *People v. Western Seamen's Soc.*, 87 Ill. 246.

² *Osborne v. Humphrey*, 7 Conn. 335; *Seymour v. Hartford*, 21 Conn. 481; *Matheny v. Golden*, 5 Ohio St. 361; *Home of the Friendless v. Rouse*, 8 Wall. 430; *Washington University v. Rouse*, 8 Wall. 439.

³ *Lord v. Town of Litchfield*, 36 Conn. 116; 4 Am. Rep. 41.

⁴ *Boston Seamen's Friend Soc. v. Boston*, 116 Mass. 181; 17 Am. Rep. 153; *First Presbyterian Church v. Ft. Wayne*, 36 Ind. 338; 10 Am. Rep. 35; *In re Mayor*, 11 Johns. 77; *Baltimore v. Cemetery*, 7 Md. 517; *St. Louis Pub.*

every kind" does not cover special assessments for street improvements.¹ A statutory exemption from taxation of school-houses and seminaries of learning extends to such as are founded by a particular religious sect for instructions according to its doctrines.² A statute exempting from taxation property given for the maintenance of the ministry of the Gospel extends to money at interest given for that object.³ An exemption of a church covers one leased as well as one owned by a congregation.⁴ Under a statute exempting from taxation buildings occupied and used exclusively for religious or educational purposes, a building for religious purposes is exempt, although it is incidentally or occasionally used for educational purposes.⁵

Under a statute exempting from taxation "churches, meeting-houses, or other regular places of stated worship in actual use and occupation for the purpose aforesaid," the land on which a church is in process of erection is not exempt.⁶ The residence of a priest or clergyman is not exempt from taxation as a "building for religious worship" because it contains one room set apart as a religious chapel.⁷ Under a statute exempting buildings used for religious worship, a part of the church building the rents of which are applied to the payment of a mortgage, and afterwards towards providing other places of worship, is not exempt.⁸ Under a statute exempting lands on which a house for religious worship is situate, any part of the lot diverted to secular uses for gain ceases to be

Schools v. St. Louis, 26 Mo. 468; *Pray v. North Liberties*, 31 Pa. St. 69; *Sioux City v. Sioux City School District*, 55 Iowa, 150.

¹ *Sheehan v. Good Samaritan Hospital*, 50 Mo. 155; 11 Am. Rep. 412; *Broadway Baptist Church v. McAtee*, 8 Bush, 508; 8 Am. Rep. 480.

² *Warde v. Manchester*, 56 N. H. 508; 22 Am. Rep. 504.

³ *Atwater v. Woodbridge*, 6 Conn. 223; 16 Am. Dec. 46.

⁴ *Howell v. City*, 1 Leg. Gaz. 242; 8 Phila. 280.

⁵ *St. Mary's Church v. Tripp*, 14 R. I. 307.

⁶ *Mullen v. Commissioners*, 85 Pa. St. 288; 27 Am. Rep. 650; *Lefevre v. Detroit*, 2 Mich. 586; *Erie Co. v. Bishop*, 13 Phila. 509. But see *Wash. Heights etc. Church v. New York*, 20 Hun, 297.

⁷ *St. Joseph's Church v. Assessors of Taxes*, 12 R. I. 19; 34 Am. Rep. 597.

⁸ *First etc. Church v. Chicago*, 20 Ill. 482.

exempt.¹ Under an exemption of houses of religious worship, such distinct tenements only are exempted as are used for religious worship and purposes connected therewith, and not tenements, though under the same roof, which are used for purposes wholly secular;² nor church buildings in process of erection,³ nor a parsonage erected on a church lot.⁴ Lands set apart as a situation for a church to be built are not exempt; nor do lots used for a cemetery become exempt by the erection on them of a burial chapel.⁵ Personal property held by a church, and invested in bonds and mortgages, is subject to taxation, notwithstanding the income therefrom may be appropriated to the support of the minister.⁶ An exemption of "houses used exclusively for public worship" exempts such grounds as may be reasonably necessary for their use; but such grounds must serve the same exclusive use to which the buildings are required to be devoted. A parsonage, although built on ground which might otherwise be exempt as attached to the church edifice, does not come within the exemption.⁷ Vacant lots bought by the authorities of a church, and held in private ownership in anticipation of the increase of the city, and with the intention of possibly erecting thereon a church, school, or hospital when needed, are not exempt from taxation as a "place of public worship," or a "charitable institution," or property used for colleges or other school purposes.⁸ A building erected on a camp-meeting ground which earns money for the general uses of the camp-meeting association is not exempt from taxation as a church, although religious services are held in a part of it.⁹ Under a statute exempting from taxation

¹ *Orr v. Baker*, 4 Ind. 86.

² *Prop. of Meeting-house v. Lowell*, 1 Met. 538.

³ *Matlock v. Jones*, 2 Disn. 2.

⁴ *State v. Axtell*, 41 N. J. L. 117.

⁵ *Trinity Church v. Mayor etc. of N. Y.*, 10 How. Pr. 138.

⁶ *Presbyterian Church v. Montgomery*, 3 Grant Cas. 245.

⁷ *Gerke v. Purcell*, 25 Ohio St. 229.

⁸ *Enaut v. McGuire*, 36 La. Ann. 804; 51 Am. Rep. 14.

⁹ *Conn. Spiritualist etc. Ass'n v. East Lyme*, 54 Conn. 152.

church property owned by the congregation, property owned by an individual and used for public worship, the congregation not being so organized as to be able to hold real estate, is not exempt.² The legislature may exempt from taxation the salaries or property of ministers of the Gospel.² One is entitled to the exemption of fifteen hundred dollars given by statute to ministers of the Gospel who for thirty-five years was such, and who since for fifteen years has withdrawn from the active duties of his calling, owing to age and infirmity, not having, however, embraced any other occupation.³ Under a statute exempting from taxation "hospitals or asylums, charitable or benevolent institutions, so far as used for the benefit of the indigent or afflicted," and "the equipments" owned by them, property belonging to such institutions which is directly devoted to charitable uses is exempt from taxation; but when the property is invested or managed so that an income is derived from it, this income is subject to taxation on the basis of the capital it represents, notwithstanding the fact that it is applied to charitable purposes,⁴ as where it is leased to a third person.⁵ Property of a corporation lawfully devoted to the care, custody, education, and maintenance of destitute mothers and children is entitled to the immunity from taxation possessed by almshouses and poor-houses.⁶

The Masonic fraternity is a "benevolent institution" within the meaning of the Indiana statute which exempts from taxation buildings "erected for the use" of

¹ *People v. Anderson*, 117 Ill. 50.

² *Plumer's Case*, 3 Gratt. 645; *Com. v. Cuyler*, 5 Watts & S. 275; *Ruggles v. Kimball*, 12 Mass. 337.

³ *People v. Peterson*, 31 Hun, 421.

⁴ *Appeal Tax Ct. v. St. Peter's Academy*, 50 Md. 321; *Appeal Tax Ct. v. Grand Lodge etc.*, 50 Md. 421; *Appeal Tax Ct. v. Balt. Academy etc.*, 50 Md. 437; *Redemptorists v. Howard County Comm'rs*, 50 Md. 449; *Appeal Tax Ct. v. University of Maryland Regents*, 50

Md. 457. The word "equipments" was held to exempt a library belonging to a school for poor children, also vessels used for the administration of the sacrament, but not to exempt a horse, carriage, or cows: *Id.*

⁵ *Young Men's Christian Ass'n v. Donohugh*, 13 Phila. 12; *Fort Des Moines Lodge v. Polk Co.*, 56 Iowa, 34.

⁶ *New York Infant Asylum v. Supervisors*, 31 Hun, 116.

such institutions,¹ as it is within the phrase "charitable institution."² Leased ground occupied by a charitable corporation, although for its charitable purposes, is not exempt, although the lease provides that the lessees (the corporation) shall pay the taxes.³ An exemption of property of orphan asylums and other charitable institutions does not exempt a devise or bequest of property to such an institution from a succession tax.⁴ The provision of the Ohio constitution and tax laws, which exempt from taxes buildings belonging to institutions of public charity, together with the land actually occupied by such institutions, etc., embraces corporations or other permanent organizations, as distinguished from temporary undertakings created to administer charities; and it exempts only real property owned by such corporations, and used by them for their charitable purposes.⁵ Real estate owned by a charitable association, and used as a temporary home and asylum for sick and poor persons, is exempt from taxation as an "almshouse."⁶ The exemption from taxation conferred on the real estate belonging to literary, benevolent, charitable, and scientific corporations "occupied by them or their officers for the purpose for which they were incorporated," is not limited to such real estate only as may appear to the court necessary for those purposes, but applies to all real estate of the corporation occupied by it or its officers, and intended for and in fact appropriated to those purposes by its officers.⁷ Buildings and improvements erected upon ground owned by and hired from a charitable corporation by the lessee under a contract by the terms of which they are, upon the expiration of the lease, to be purchased by the corporation

¹ Indianapolis v. Grand Master etc., 25 Ind. 518.

² Mayor v. Solomon's Lodge, 53 Ga. 93; State v. Assessors, 34 La. Ann. 574; *contra*, Bangor v. Rising Virtue Lodge, 73 Me. 428; 40 Am. Rep. 369.

³ Humphries v. Little Sisters of the Poor, 29 Ohio St. 201.

⁴ Miller v. Com., 27 Gratt. 110.

⁵ Humphries v. Little Sisters of the Poor, 29 Ohio St. 201.

⁶ People v. Tax Comm'rs, 36 Hun, 311.

⁷ Massachusetts General Hospital v. Somerville, 101 Mass. 319.

are not exempt from taxes during the term, as being the property of the corporation.¹ Lodging-houses of a religious and charitable corporation, the rooms whereof were let to tenants at the usual rates of rent, are not exempt from taxation under the Massachusetts statute, although the proceeds were devoted to certain charitable uses named in the charter.² In a New York case it was held that lots of land leased by the society to parties who had agreed to erect buildings thereon with privilege of perpetual renewal were not exempt.³

Such part only of real estate as is exclusively occupied by a library society is exempt from taxation in Michigan.⁴ A corporation organized for "the establishment of a library," and whose property is exempted by law from taxation, cannot avail themselves of such exemption in respect to a building erected by them and leased for various uses, excepting so far as used for the purposes of the library.⁵ The exemption of "institutions of purely public charity" from taxation extends to private institutions for purposes of purely public charity, which are not administered for private gain. This includes the Library Company of Philadelphia, allowing the use of the library by "all" persons within the library building free of charge, also by "all" persons who desire to take out books for a small hire.⁶ An incorporated college founded and endowed by the gifts of citizens, managed by trustees appointed by a Lutheran church synod, and the chief object of which is to furnish education cheaply, none having an absolute right of admission, is not an institution of learning, benevolence, and charity founded, endowed, and maintained by public or private charity such as is en-

¹ *New Orleans v. Russ*, 27 La. Ann. 413.

² *Trustees of the Chapel of the Good Shepherd v. Boston*, 120 Mass. 212.

³ *People v. Brooklyn Assessors*, 27 Hun, 559.

⁴ *Detroit Young Men's Society v. Mayor etc.*, 3 Mich. 172.

⁵ *State v. City of Elizabeth*, 28 N. J. L. 103.

⁶ *Donohugh's Appeal*, 86 Pa. St. 306; and see *Phila. Library Co. v. Donohugh*, 12 Phila. 284.

titled to exemption from taxation.¹ An academy not for personal profit is a public school within the meaning of the exemption law.² A school-building exempt from taxation continues exempt, although a room therein is rented for another purpose and the rent used for the school.³ Where an incorporated seminary for the care and education of young men acquired a very large farm; all its products were used to supply the teachers, students, and servants; and the college buildings were located on the farm,—it was held exempt from taxation.⁴ Under a statute exempting from taxation school-houses and the lots on which they are situated, the owner of a house and lot who leases it to the board of education for use as a public school cannot claim an exemption.⁵ A private grammar or boarding school is not a college, academy, or seminary of learning within an exemption statute.⁶ An exemption of "all colleges, academies, or seminaries of learning" extends to the houses and lots provided by the College of New Jersey for the residences of president, professors, and steward as part of their compensation for official service.⁷ An exemption of "all buildings and property used exclusively for colleges or other school purposes" does not include property used for revenue to be applied to support of a college or school.⁸ The "free public schools" exempted by the Rhode Island statute are only those schools which are established, maintained, and regulated under the statute laws of the state. Hence the law does not relieve from taxation realty held by a religious corporation, and used by ecclesiastical officers to furnish gratuitous instruction in parochial schools.⁹ An

¹ Thiel College v. Mercer County, 101 Pa. St. 530.

² Willard v. Pike, 59 Vt. 202.

³ N. St. Louis Gymnastic Soc. v. Hudson, 12 Mo. App. 342.

⁴ People v. Barber, 42 Hun, 27.

⁵ People v. Brooklyn Assessors, 32 Hun, 457.

⁶ State v. Ross, 24 N. J. L. 497; Chegaray v. Mayor, 13 N. Y. 220.

⁷ State v. Ross, 24 N. J. L. 497.

⁸ State v. Assessors, 35 La. Ann. 668.

⁹ St. Joseph's Church v. Providence Assessors, 12 R. I. 19; 34 Am. Rep. 597.

exemption of buildings of incorporated seminaries is not forfeited by renting them for the accommodation of boarders during the summer.¹ Nothing in the New York statutes can be construed as exempting from taxation real estate used as a medical college, hospital, and free dispensary for women.² Lands and buildings used exclusively for the purpose of an academy or seminary for the instruction of females agreeably to the faith and practice of the Roman Catholic Church, and for dormitories and convenient out-buildings in connection therewith, are exempted from taxation in New Hampshire.³

ILLUSTRATIONS.—The constitution of a state provided that "such property as the general assembly may deem necessary for schools, religious and charitable purposes, may be exempt from taxation." *Held*, that only such property could be exempted as was actually used for the purposes named in the constitution; and that there could be no exemption of lands held for profit merely, although such profit was devoted to educational, religious, or charitable purposes: *Northwestern Univ. v. Eddy*, 80 Ill. 333; 22 Am. Rep. 187. A statute exempted grounds and buildings of literary, benevolent, agricultural, and religious institutions and societies devoted solely to the public objects of these institutions, not exceeding 640 acres in extent, and not leased or otherwise used with a view to pecuniary profit. *Held*, that the dwellings of professors on the grounds of literary institutions, and of clergymen, owned by religious societies, exclusively so used, and producing no income, are appropriate to the objects of those institutions and societies, and exempt from taxation: *Trustees of Griswold College v. State*, 46 Iowa, 275; 26 Am. Rep. 138. A statute exempted from taxation churches and other public buildings for religious worship, with the appurtenant lots of ground used therewith for that purpose. *Held*, that this did not embrace a parsonage or rectory: *First Presbyterian Church v. City of New Orleans*, 30 La. Ann. 259; 31 Am. Rep. 224. The charter of a library association authorized the establishment of a library and the erection of suitable buildings, and provided that it might hold such real estate as might be necessary for the purpose of carrying out the object of the association, and exempted the association and its property from taxation. *Held*, that a building erected and used in

¹ *Temple Grove Seminary v. Cramer*, 26 Hun, 309; 98 N. Y. 121.

² *People v. Campbell*, 93 N. Y. 196.

³ *Warde v. Manchester*, 56 N. H. 508; 22 Am. Rep. 504.

part by the association, the remainder of which was leased for stores, a public hall, and for other purposes, was exempt from taxation: *State v. Leester*, 29 N. J. L. 541. A building was at first intended for three dwelling-houses, but soon after the foundation was laid, it was, under an agreement between the plaintiff and the owner, altered and finished for the use and adapted to the purposes of a seminary, and was used as such. The statute provides that every building erected for the use of a college, incorporated academy, or other seminary of learning shall be exempt from taxation. *Held*, that, by a reasonable construction of the statute, this building was within it, and therefore was not a subject of taxation: *Chegaray v. Mayor*, 2 Duer, 521. In January, 1873, a religious society leased for two years its meeting-house and the land connected therewith to the United States for the use of the government, having previously purchased another lot of land, upon which a church edifice had been begun, and having made arrangements elsewhere for a temporary place of worship in the mean time. The pulpit, organ, and pews were removed from the meeting-house, and were not replaced, and since the lease, the building had not been in a condition, and no attempt had been made to put it in a condition, suitable for a place of worship. In 1874, on petition of the society, it was authorized by statute to sell the meeting-house and land, and the society afterwards endeavored to sell the same upon conditions, one of which was that the premises should never be used as a place of public worship. In May, 1875, a tax was assessed upon the premises, which was paid under protest. *Held*, that the property was not exempt from taxation: *Old South Society v. Boston*, 127 Mass. 878. The title to forty acres of land was held in trust for a religious body, but the land was not used for religious purposes, except that about half an acre was a burying-ground. *Held*, that only the half-acre was exempt under a statute exempting property "devoted solely to the appropriate objects" of religious institutions: *Mulroy v. Churchman*, 60 Iowa, 717; 52 Id. 238. Tracts for forty, twenty, and fourteen acres, acquired by a seminary long after the original site of eight acres, all within the common inclosure, and used, part for pleasure-grounds for the pupils, and part for gardening, orchard, and pasturage for the institution. *Held*, exempt from taxation, not being "used with a view to profit": *Monticello Fem. Sem. v. People*, 106 Ill. 398; 46 Am. Rep. 702. The Young Men's Christian Association erected a building to be used for holding religious and social meetings, and as a lecture-room, reading-room, gymnasium, and institute of learning. *Held*, that the building was exempt, although not used exclusively for religious purposes: *Young Men's Christian Ass'n v. New York*, 44 Hun, 102. A

statute exempts from taxation the buildings, etc., of charitable and benevolent institutions. *Held*, that that part of a building belonging to such an association which was let for rent and devoted to other than charitable and benevolent purposes should be taxed: *Baltimore v. Grand Lodge*, 60 Md. 280.

§ 634. Visitation of Corporations—Powers of Visitors.

—What is known as the power of visitation applies to ecclesiastical and charitable corporations for the purpose of their inspection and regulation.¹ The visitor is appointed by the donor or his heirs,² unless the power has been assigned to others.³ In the case of colleges, academies, and schools in this country, the trustees named in the charter, and those chosen as their successors according to its terms, are not only trustees of the fund, but also take the place of the founder of the charity as its lawful visitors and overseers.⁴ The only duty of the courts is to see that the trust is faithfully executed.⁵ If general visitorial power is conferred upon the selectmen of a town in the capacity of trustees of an academy, the selectmen are not the agents of the town, and accountable to it for their acts as visitors;⁶ nor can they, in the exercise of their power as visitors, be controlled by the town.⁷ They exercise a special authority, created by the will of the testator, or, if incorporated, conferred by the act of incorporation.⁸ No particular form of words is required to

¹ *Rex v. Bishop of Ely*, 2 Term Rep. 280; *Philips v. Bury*, 2 Term Rep. 346; *Murdock v. Phillips Academy*, 12 Pick. 244; *Amherst Academy v. Cowls*, 6 Pick. 427; 17 Am. Dec. 387; *Binney's Case*, 2 Bland, 141; *Allen v. McKeen*, 1 Sumn. 276. The Pennsylvania act, which provides for the appointment of a board of trustees for all charitable uses or trusts of Philadelphia, is constitutional: *Philadelphia v. Fox*, 64 Pa. St. 169.

² *Darmouth College v. Woodward*, 4 Wheat. 673; *Sanderson v. White*, 18 Pick. 328, 334; 29 Am. Dec. 591; *In re Berkhamstead School*, 2 Ves. & B. 134; *Attorney-General v. St. Cross Hospital*, 17 Beav. 435; *Attorney-*

General v. Clare College, 3 Atk. 662; *Eden v. Foster*, 2 P. Wms. 325; *Green v. Rutherford*, 1 Ves. Sr. 462; *Attorney-General v. Archbishop of York*, 2 Russ. & M. 641.

³ *Nelson v. Cushing*, 2 Cush. 519; *Murdock v. Phillips Academy*, 7 Pick. 304; *King v. Bishop of Worcester*, 4 Maule & S. 415.

⁴ *Murdock v. Phillips Academy*, 7 Pick. 303; *Bracken v. William and Mary College*, 1 Call, 161; 3 Call, 573; *State v. Adams*, 44 Mo. 570.

⁵ *State v. Adams*, 44 Mo. 570.

⁶ *Nelson v. Cushing*, 2 Cush. 519.

⁷ *Nelson v. Cushing*, 2 Cush. 519.

⁸ *Nelson v. Cushing*, 2 Cush. 519.

create a visitor.¹ A power of general superintendence given by the founder to the trustees of an eleemosynary institution make them visitors, though not so called in the will.² Heirs of the founder of an eleemosynary corporation have no visitorial power where the trustees are not themselves objects of the donor's charity and are vested by the founder with a general control, superintendence, and management of the trust, which, in effect, gives them the power of visitors; as where a sum of money is bequeathed to certain trustees and their successors, who afterwards become incorporated in trust to invest the same in such secure manner as they shall think best, and to apply the income to the pay or maintenance of a faithful and competent instructor in a certain school to be established by them for pious and indigent youth, and authorizing the trustees and their successors "to make from time to time such rules and regulations as they may believe best adapted to insure success."³

The visitor must act in accordance with the charter or statute.⁴ Regulations that in ordinary corporations are made by stockholders, and disputes that are submitted to the courts, are, in the case of eleemosynary corporations, made and decided by those intrusted with the visitorial power.⁵ They may examine into and regulate the conduct of members,⁶ amend and repeal by-laws of the corporation,⁷ correct abuses,⁸ and assume the general management of the trust,⁹ subject only to the expressed will

¹ *Rex v. Bishop of Ely*, 1 W. Black. 83; *Rex v. Bishop of Worcester*, 4 Maule & S. 415; *Sanderson v. White* 18 Pick. 328; 29 Am. Dec. 591.

² *Drury v. Natick*, 10 Allen, 175.

³ *Sanderson v. White*, 18 Pick. 328; 29 Am. Dec. 591.

⁴ *State v. Adams*, 44 Mo. 570; *Rex v. Bishop of Ely*, 2 Term Rep. 290; *Phillips v. Bury*, 2 Term Rep. 350.

⁵ *State v. Adams*, 44 Mo. 570; *Murdock v. Phillips Academy*, 12 Pick. 262.

⁶ *Phillips v. Bury*, 2 Term Rep. 349; *Garnett v. Fernand*, 6 Barn. & C. 611; *Murdock v. Academy*, 12 Pick. 262.

⁷ See *Trustees of Phillips Academy v. King*, 12 Mass. 547; *Attorney-General v. Earl of Clarendon*, 17 Ves. 491; *Darmouth College v. Woodward*, 4 Wheat. 660.

⁸ *Phillips v. Bury*, 2 Term Rep. 348; *Attorney-General v. Price*, 3 Atk. 103; *Bracken v. William and Mary College*, 3 Call, 573.

⁹ *Sanderson v. White*, 18 Pick. 328; 29 Am. Dec. 591; *Allen v. McKean*, 1 Sum. 276; *Attorney-General v. Middleton*, 2 Ves. Sr. 327; *In re Christ Church*, L. R. 1 Ch. App. 525.

of the founder as embodied in the charter.¹ A visitor cannot compel a specific performance,² nor can he take cognizance of acts of disobedience to the general laws of the land.³ At common law the decision of a visitor is final, and no appeal can be made from it,⁴ unless it is given by the charter or act of incorporation.⁵ But equity will enforce a trust, and a visitor acting in breach of the trust will be enjoined or prohibited or removed.⁶ In a New York case, the powers and duties of the New York State Board of Charities, and its right of visitation and examination against the Juvenile Guardian Society, were considered. In an equitable action by the latter, the court refused to enjoin the board from exercising the power of visitation over the society, or to oblige the board to conduct their inspections according to the forms of civil or criminal proceedings, the board having simply the power of reporting to the legislature or the attorney-general the results of their inquiry. No notice need be given by the board in advance of their visits, nor specific charges furnished; the examination may be secret; the institution visited is not entitled to be present by its officers or counsel at the taking of testimony. The discretion given by the statute is most comprehensive.⁷ The visitor of all civil corporations, public or private, is the legislature.⁸

¹ *State v. Adams*, 44 Mo. 570; *Dartmouth College v. Woodward*, 4 Wheat. 676; *Gilman v. Hamilton*, 16 Ill. 225.

² *Rex v. Windham*, Cowp. 377.

³ *Rex v. St. John's College*, 4 Mod. 233.

⁴ *Philips v. Bury*, 2 Term Rep. 346; *Rex v. Bishop of Ely*, 2 Term Rep. 290; *Murdock's Appeal*, 7 Pick. 322; *Attorney-General v. Talbot*, 3 Atk. 662; *Rex v. Bishop of Worcester*, 4 Maule & S. 415; *University v. Williams*, 9 Gill & J. 365; 31 Am. Dec. 72; *People v. Sailor's Snug Harbor*, 54 Barb. 532.

⁵ *Murdock's Appeal*, 7 Pick. 322.

⁶ *Attorney-General v. St. Cross Hospital*, 17 Beav. 435; *Attorney-General v. Sydney Sussex College*, L. R. 4 Ch. 722; *Shore v. Wilson*, 9 Clark & F. 355; *Thornton v. Howe*, 31 Beav. 14; *Attorney-General v. Daugars*, 33 Beav. 621; *Daugars v. Rivaz*, 28 Beav. 233; *Attorney-General v. Garrison*, 101 Mass. 223; *Attorney-General v. Tudor Ice Co.*, 104 Mass. 239; 6 Am. Rep. 227; *Attorney-General v. Utica Ins. Co.*, 2 Johns. Ch. 384.

⁷ *Juvenile Guardian Society v. Roosevelt*, 7 Daly, 188.

⁸ *Amherst Academy v. Cows*, 6 Pick. 427; 17 Am. Dec. 387; *Com. v. Del. Canal Co.*, 43 Pa. St. 295.

ILLUSTRATIONS. — A bequest directed the payment of an annual sum from the income of the testator's real estate, to be invested and accumulated by trustees for a specified time, and upon its expiration to be appropriated by a society of ladies from all the Protestant religious societies in a certain town, to establish a charity. *Held*, that such society have merely visitatorial powers as managers of the charity, but that the legal title to the fund will remain in the trustees: *Odell v. Odell*, 10 Allen, 1.

TITLE III.
PARTNERSHIP.

TITLE III.

PARTNERSHIP.

CHAPTER XXXVI.

GENERAL PARTNERSHIPS.

- § 635. What is a partnership — Contract of.
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- § 679. Return of premium paid on entering.
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- § 681. Suits between partners.
- § 682. Distribution of assets after settlement.
- § 683. Payment of losses.
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- § 685. The "good will" of the business — Rights of partners as to.
- § 686. Rights of purchaser of.
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§ 635. What is a Partnership — Contract of. — A partnership is a voluntary,¹ unincorporated association of individuals, standing to one another in the relation of principals,² for the carrying out of a joint operation or undertaking for the purposes of a joint profit.³ The contract of partnership need not be in writing; it may be by word of mouth,⁴ or it may arise from the transactions or acts of the parties, without even an express agreement to form a partnership.⁵ When the terms of a partnership have been reduced to writing, the written articles are presumed to contain all the conditions of the partnership.⁶ A part-

¹ Hedge's Appeal, 63 Pa. St. 273.

⁴ Parsons on Partnership, 7; Buffum

² Campbell v. Dent, 54 Mo. 325; v. Buffum, 49 Me. 108.

Eastman v. Clark, 53 N. H. 276;

⁵ Parsons on Partnership, 8.

Harvey v. Childs, 23 Ohio St. 319.

⁶ Boardman v. Close, 44 Iowa, 428.

³ Dixon on Partnership; Howell v. Harvey, 5 Ark. 270; 39 Am. Dec. 376. The existence of a partnership is best established by the production of the

nership agreement which contemplates present and continuous action creates a present partnership.¹ Persons associating themselves together under articles to purchase property and to carry on a manufacturing business, if their organization be so defective as to come short of creating a corporation within the statute, become in legal effect partners; and their rights as members of the company to the property acquired by such company will be recognized and protected.² Associations and clubs, the objects of which are social and political, and not for purposes of trade or profit, are not partnerships, and pecuniary liability can be fastened upon individual members thereof only by reason of their acts or the acts of their agents; and agency is not implied from the mere fact of association, but must be proved. A course of dealing may amount to proof of original authority.³ The rule requiring the common sharing of profits and losses to constitute a partnership has been applied to members representing granges of the Patrons of Husbandry, subordinate to the state grange, composed thereof as delegates, and it was held that they were not liable for acts of a state agent of the order.⁴ The members of a Masonic lodge are presumptively not partners.⁵ An association of which the conditions of membership are payment of an entry fee and *pro rata* assessments, but which does no business involving profit and loss, is not a partnership; and the members are not personally liable on contracts made by its officers.⁶ An action at law lies for breach of an agreement to form a partnership. It lies also for breach of a covenant in a partnership agreement, where the damages

letters constituting it, but may be proved otherwise; yet if the partners themselves are seeking to prove the partnership, they should be required to bring forward the letters, unless they show a legal excuse for their non-production: *Bonnafe v. Fenner*, 6 Smedes & M. 212; 45 Am. Dec. 278.

¹ *Kerrick v. Stevens*, 55 Mich. 167.

² *Whipple v. Parker*, 29 Mich. 369.

³ *Richmond v. Judy*, 6 Mo. App. 465.

⁴ *Edgerly v. Gardner*, 9 Neb. 130.

⁵ *Ash v. Guie*, 97 Pa. St. 493; 39 Am. Rep. 818.

⁶ *Burt v. Lathrop*, 52 Mich. 106.

belong exclusively to the partner claiming, and can be assessed without an accounting of the business.¹

§ 636. What may be Object of Partnership.—The object of the partnership must be legal, or it will not be created.² Subject to this restriction almost any purpose or calling may be the object of a partnership. "Such combinations are usually for the transaction of some particular branch of trade or commerce; but this is not essential to constitute persons legal partners. There may be a partnership in almost every occupation. It may exist between lawyers, conveyancers, physicians, artists, brokers, farmers, and mechanics; it may be for stage-driving, fishing, hunting, mining, or manufacturing."³ Thus the following purposes have been held the proper objects of a partnership, viz.: Buying and selling lands;⁴ buying a thrashing-machine jointly, to do a thrashing business;⁵ jointly keeping sheep for certain shares of the wool.⁶ A mining partnership is governed by many of the rules relating to ordinary partnerships, but it has some rules peculiar to itself. One is, that each owner has a right at any time to sell and convey his interest without dissolving the partnership. Another is, that the law does not imply any authority, either to a member of such partnership or to its managing agent, to bind the company, or its individual members, by a promissory note or a contract of indebtedness executed in the name of the company.⁷

ILLUSTRATIONS.—A being the lessee of a farm, B furnished laborers thereon under him, with the agreement between them

¹ Hill v. Palmer, 56 Wis. 123; 43 Am. Rep. 703.

² Parsons on Partnership, 9-11; Bartle v. Coleman, 4 Pet. 184.

³ 1 Schouler on Personal Property, sec. 172; Bromley v. Elliott, 38 N. H. 287; 75 Am. Dec. 182. It may be for a single adventure as well as for a number of transactions or a given term: Re Warren, Daveis, 320; Kayser v. Maugham, 8 Col. 232.

⁴ Chester v. Dickerson, 54 N. Y. 1;

13 Am. Rep. 550; Ludlow v. Cooper, 4 Ohio St. 1; Fall River Co. v. Borden, 10 Cush. 458; Sumner v. Hampson, 8 Ohio, 328; 32 Am. Dec. 722; Clagett v. Kilbourne, 1 Black, 346; Dudley v. Littlefield, 21 Me. 418.

⁵ Aultman v. Fuller, 53 Iowa, 60.

⁶ Stapleton v. King, 33 Iowa, 28; 11 Am. Rep. 109.

⁷ Skillman v. Lachman, 23 Cal. 198; 83 Am. Dec. 96.

to share the net profits equally. *Held*, that this was a partnership, and that B was liable for debts contracted by A on account of the concern: *Brown v. Higginbotham*, 5 Leigh, 583; 27 Am. Dec. 618. Two persons agreed to burn lime on shares, one to fill a kiln with stone, and the other to burn the kiln and furnish the wood, the lime to be equally divided between them. *Held*, that a technical partnership existed between the parties: *Musier v. Trumbour*, 5 Wend. 275. A, the owner of an invoice of goods in the city of New York, sold one half of his interest therein to B, who was to proceed to San Francisco and there dispose of the goods on joint account. *Held*, that this constituted them partners: *Soule v. Hayward*, 1 Cal. 345.

§ 637. **The Firm Name.**—The business of a partnership may be carried on under any name which the partners may adopt.¹ The mere change in the name of a firm does not affect its rights or liabilities.² When the same persons carry on the same business as partners in two different places, under different names, there is in law but a single partnership, and all the creditors have an equal interest in the assets of both nominal firms.³ To bind a partner by a note drawn by his copartner in his own individual name, it must appear that such individual name was the style of the firm.⁴ Where a particular name under which a business is carried on by any person, firm, or company has become associated with and appropriated to that business, no other person may carry on a like business under the same name, or a name only colorably differing therefrom, in a manner calculated to de-

¹ In *Carmichel v. Latimer*, 5 Cent. L. J. 7, the court say: "There is to be noticed a peculiarity in some English cases, growing out of the practice of keeping up the name of an old mercantile firm for several generations, or successions of partners, and when no partner of the original name remained. This practice is noticed and commented on in *Hall v. Barrows*, 4 De Gex, J. & S. 150, 156; *Leather Cloth Co. v. American Leather Cloth Co.*, 4 De Gex, J. & S. 137, 143; and by Lord Kingsdown in the last-named case in House of Lords, 11 H. L. 542, mentioning

instances. See also *Croft v. Day*, 7 Beav. 84. In such cases no one is deceived. The name and good-will are understood by the public to belong to the existing firm. It is believed, so far as we can learn from the cases, that that practice is not common in this country, and in New York it is forbidden by express statute. So also in France."

² *Gill v. Ferris*, 82 Mo. 156.

³ *Campbell v. Coal etc. Co.*, 9 Col. 60.

⁴ *Macklin v. Crutcher*, 6 Bush, 401; 99 Am. Dec. 680.

ceive customers by leading them to believe that they are dealing with such person, firm, or company as first mentioned.¹ After a dissolution, each of the partners or his representatives may restrain any other partner from carrying on the same business under the partnership name, until the affairs of the partnership have been wound up and the property disposed of.² A continuing partner has been enjoined from using the old firm name so as to give to third persons good cause to believe that the retired partner was still in the firm, the latter in selling out to the former not having mentioned the good-will.³ Under the New York statute, the successors of one dead, who for five years carried on business in his sole name, may use his name as theirs in continuing his business, with the addition of "& Co.," and with the permission of his legal representatives.⁴ It has been held in Pennsylvania that the New York statute forbidding the transaction of business in the name of a partner not interested in the firm, under the penalty of a fine not exceeding one thousand dollars, being highly penal in its nature, will be strictly construed by the courts of Pennsylvania, and will not include a transaction which is not an ordinary incident of the business in which the firm is engaged. As, for example, a lease, by a millinery firm, of a part of its building.⁵

ILLUSTRATIONS. — A retiring partner engaged in the same line of business within fifty feet of the old store where his copartners continued their business, and put up a sign with his name in the first line; in the second, the words "of the late firm of," in letters four and a half inches long, and in the lowest line, the name of the old firm, in letters eleven and a half inches long. *Held*, that an injunction ought to issue, even though fraudulent intention did not appear: *Smith v. Cooper*, 5 Abb. N. C. 274. C. W. D. & Co., a copartnership which had an extensive trade and reputation as dealers in seeds, made an assignment for the benefit of creditors, and the assignee sold

¹ See *post*, Title Trade-marks.

² 2 Lindley on Partnership, 887.

³ *McGowan Bros. Pump etc. Co. v. McGowan*, 22 Ohio St. 370.

⁴ *Arnstaedt v. Blumenfeld*, 13 Daly, 354.

⁵ *Sparrow v. Kohn*, 109 Pa. St. 359; 58 Am. Rep. 726.

the stock to the plaintiff company, which continued the business at the old stand, renting the building from the owner. Among the stock so purchased was a large number of wrappers, sacks, etc., marked with the name of C. W. D. & Co. One of the firm of C. W. D. & Co. was also a member of the plaintiff company. Afterward, C. W. D. organized a corporation under the name of C. W. D. & Co., and engaged in the same business in the same city. The plaintiff claimed but never exercised the right to use the name of C. W. D. & Co. *Held*, that the plaintiff was not entitled to an injunction restraining the defendant from using that name and receiving mail matter thus directed: *Iowa Seed Co. v. Dorr*, 70 Iowa, 481; 59 Am. Rep. 446.

§ 638. Who may be Partners.—As to who may be partners, the general rules as to the capacity to make contracts govern. This would therefore exclude infants, insane persons, married women, except as permitted by the modern legislation in their favor, and alien enemies. An infant's contract of partnership is not void, but voidable only. If he affirm it after he arrives at age, he will be bound by it.¹ If an infant forms a partnership with an adult, he holds himself forth to the world as not being an infant. He practices a fraud on the world.² A manufacturing corporation cannot enter into partnership for any purpose with a private individual; much less can it enter into a partnership for the transaction of business other than that for which it was created.³ There is no limit at common law to the number of persons who may enter into a partnership.⁴

§ 639. Who are Partners — Evidence — General Reputation.—General reputation that one is a partner in a firm is not sufficient to charge him as such;⁵ nor that the

¹ *Penn v. Whitehead*, 17 Gratt. 503; 13 N. H. 99; 38 Am. Dec. 478; *Carter v. Douglass*, 2 Ala. 499; *Campbell v. Hastings*, 29 Ark. 512; *Hicks v. Cram*, 17 Vt. 449; *Carlton v. Ludlow Mills*, 27 Vt. 496; *Halliday v. McDougall*, 20 Wend. 81; 22 Wend. 264; *Smith v. Griffith*, 3 Hill, 333; 38 Am. Dec. 639; *Brown v. Crandall*, 11 Conn. 92; *Sinclair v. Wood*, 3 Cal. 98; *Bowen v.*

94 Am. Dec. 478.
² *Kemp v. Cook*, 18 Md. 130; 79 Am. Dec. 681.

³ *Whittenton Mills v. Upton*, 10 Gray, 592; 71 Am. Dec. 681.

⁴ 1 *Lindley on Partnership*, 201.

⁵ *Hunt v. Jucks*, 1 Hayw. 173; 1 Am. Dec. 555; *Grafton Bank v. Moore*,

party was frequently seen in the store or office of the firm doing business, and was generally understood to be a partner.¹ Evidence that a person was "interested" in a certain business is not sufficient to prove a partnership.² Evidence that one was often in the store conducted in the name of another, that he bought, sold, and bartered goods there, inspected the goods, and made charges, and went to Boston and bought goods for the store, is evidence to prove that he was a partner, he having formerly been a partner, and the old sign of the firm still remaining upon the building.³ The fact that printed handbills, with the name of the firm signed thereto, were posted at various places in the town where the defendant was residing, and that one of them was posted on the door of the house where he boarded, is competent evidence to be submitted to the jury in determining the fact whether or not a partnership existed.⁴ The declaration of an agent of the firm that one was a partner does not bind him.⁵ Where certain evidence has been introduced tending to establish a partnership between defendants, the declarations of one of them out of the presence of the other, and not communicated to him, may be given in evidence to bind the latter.⁶ The books of a firm are evidence of the partnership as between the members.⁷ Two persons signing a note jointly is no evidence of a partnership between them.⁸

Rutherford, 60 Ill. 41; 14 Am. Rep. 25; Earl v. Hurd, 5 Blackf. 248; Scott v. Blood, 16 Me. 192; Goddard v. Pratt, 16 Pick. 412; Sager v. Tupper, 38 Mich. 258; Lockridge v. Wilson, 7 Mo. 560; Southwick v. McGovern, 28 Ill. 533; Tumlin v. Goldsmith, 40 Ga. 221. Upon the issue as to whether a member of a firm is a dormant partner, evidence of a general reputation is admissible: Metcalf v. Officer, 1 McCrary, 325.

¹ Bryden v. Taylor, 2 Har. & J. 396; 3 Am. Dec. 554.

² Levy v. McDowell, 45 Tex. 220.

³ State v. Wiggin, 20 N. H. 449.

⁴ Tumlin v. Goldsmith, 40 Ga. 221; Bancroft v. Haworth, 29 Iowa, 462.

⁵ Plumer v. Lord, 9 Allen, 455; 85 Am. Dec. 773.

⁶ Folk v. Wilson, 21 Md. 538; 83 Am. Dec. 599.

⁷ Frick v. Barbour, 64 Pa. St. 120. To prove a partnership, the partnership books alone are not competent evidence, but in connection with evidence tending to prove the partnership, and access to and knowledge of the books, are competent: Bryce v. Joynt, 63 Cal. 375; 49 Am. Rep. 94. See Folk v. Wilson, 21 Md. 538; 83 Am. Dec. 599.

⁸ Hopkins v. Smith, 11 Johns. 161.

ILLUSTRATIONS.—In a suit against a surviving partner for goods sold, an unexplained failure to answer a letter written at the time of the sale, addressing him as partner with the deceased who carried on the business, *held*, an implied admission of the fact of partnership: *Humes v. O'Bryan*, 74 Ala. 64.

§ 640. Who are Partners—Sharing Returns and Profits.—The sharing of gross returns of a business or undertaking does not make the sharers partners.¹ It has been held that the sharing of profits is the test of a partnership,² but this rule in the modern cases has been somewhat limited and restricted, viz., that the sharing of profit is evidence of, but is not conclusive of, a partnership; whether a partnership does or does not exist depends on the intention of the parties under their agreement.³ The liability of one partner for the contracts of another, when not estopped from denying the liability, is founded on the relation they sustain of being each principal and agent in the joint business. That relation is therefore the true test of a partnership, and the

¹ *McDonnell v. Battle House Co.*, 67 Ala. 90; 42 Am. Rep. 99.

² *Dob v. Halsey*, 16 Johns. 34; 8 Am. Dec. 293; *Miller v. Hughes*, 1 A. K. Marsh. 181; 10 Am. Dec. 719; *Brown v. Higginbotham*, 5 Leigh, 583; 27 Am. Dec. 618; *Bartlett v. Jones*, 2 Strob. 471; 49 Am. Dec. 606; *Sheridan v. Medara*, 10 N. J. Eq. 469; 64 Am. Dec. 464; *Bromley v. Elliott*, 38 N. H. 287; 75 Am. Dec. 182; *Howze v. Patterson*, 53 Ala. 205; 25 Am. Rep. 607; *Smith v. Small*, 54 Barb. 223; *Dalton City Co. v. Dalton Mang. Co.*, 33 Ga. 243; *Chapman v. Liscomb*, 18 S. C. 222; *Wilcox v. Dodge*, 12 Ill. App. 517; *Arzuimbo v. Hillier*, 49 N. Y. 253; *Jones v. Call*, 93 N. C. 170; *Lockwood v. Doane*, 107 Ill. 235.

³ *Cox v. Hickman*, 8 H. L. Cas. 268; *Hart v. Kelley*, 83 Pa. St. 286; *Harvey v. Childs*, 28 Ohio St. 319; 22 Am. Rep. 387; *Smith v. Knight*, 71 Ill. 148; *In re Francis*, 2 Saw. 286; 7 Nat. Bank. Reg. 259; *Williams v. Soutter*, 7 Iowa, 435; *Polk v. Buchanan*, 5 Sneed, 721; *Price v. Alexander*, 2 G. Greene,

427; 52 Am. Dec. 527; *Manhattan Bros. etc. Co. v. Seals*, 45 N. Y. 797; 6 Am. Rep. 177; *Hankey v. Becht*, 25 Minn. 212; *Canada v. Barksdale*, 76 Va. 899; *Re Ward*, 2 Flipp. C. C. 422; *McDonald v. Matney*, 82 Mo. 358; *Parchen v. Anderson*, 5 Mont. 438; 51 Am. Rep. 65; *Gill v. Ferris*, 82 Mo. 156; *Magovern v. Robinson*, 40 Hun, 166; *Wright v. Canal Co.*, 40 Hun, 343; *Gurr v. Martin*, 73 Ga. 528; *Monroe v. Greenhoe*, 54 Mich. 9; *Wells v. Babcock*, 56 Mich. 276; *Thayer v. Augustine*, 55 Mich. 187; 54 Am. Rep. 361; *Hazard v. Hazard*, 1 Story, 371; *Whitney v. Ludington*, 17 Wis. 140; 84 Am. Dec. 734; *Chapline v. Conant*, 3 W. Va. 507; 100 Am. Dec. 766; *Meehan v. Valentine*, 29 Fed. Rep. 276; *Kellogg News Co. v. Farrell*, 88 Mo. 594; *Clifton v. Howard*, 89 Mo. 192; 58 Am. Rep. 97; *Colwell v. Britton*, 59 Mich. 350; *Kelly v. Gaines*, 24 Mo. App. 506; *Bloomfield v. Buchanan*, 13 Or. 108; *St. Louis Bank v. Altheomer*, 91 Mo. 190.

liability rests on the ground that it was incurred on the express or implied authority of the party sought to be charged.¹ The sharing of profits for his compensation, or as additional compensation to his salary, does not make an agent or servant a partner.²

When the agreement is that one person shall furnish the land, and that the other shall occupy and cultivate it, dividing the crops in a certain proportion, this will not create the relation of partners between the parties so contracting.³ The loan of money to be invested in trade, the lender to have one half the net profits therefor, is not a partnership;⁴ nor an agreement to furnish goods at a

¹ *Harvey v. Childs*, 28 Ohio St. 319; 22 Am. Rep. 387.

² *Holbrook v. Oberne*, 56 Iowa, 324; *Smith v. Bodine*, 74 N. Y. 30; *Nicholus v. Thielges*, 50 Wis. 491; *Simpson v. Feltz*, 1 McCord Ch. 213; 16 Am. Dec. 602; *St. Victor v. Doubert*, 9 La. 314; 29 Am. Dec. 447; *Loomis v. Marshall*, 12 Conn. 69; 30 Am. Dec. 596; *Wilkinson v. Jet*, 7 Leigh, 115; 30 Am. Dec. 493; *Champion v. Bostwick*, 18 Wend. 175; 31 Am. Dec. 377; *Bartlett v. Jones*, 2 Strob. 471; 49 Am. Dec. 606; *Chandler v. Howland*, 7 Gray, 348; 66 Am. Dec. 487; *Fitch v. Harrington*, 13 Gray, 468; 74 Am. Dec. 641; *Bull v. Schuberth*, 2 Md. 38; *Miller v. Bartlett*, 15 Serg. & R. 137; *Christian v. Crocker*, 25 Ark. 327; 99 Am. Dec. 223; *Parker v. Canfield*, 37 Conn. 250; *Crawford v. Austin*, 34 Md. 49; *Meserve v. Andrews*, 104 Mass. 360; *Re Blumenthal*, 18 Bank. Reg. 555; *Butler v. Finch*, 21 Hun, 210; *Buzard v. Bank*, 67 Tex. 83; *Le Fevre v. Casagnio*, 5 Col. 564; *Einstein v. Gourdin*, 4 Wood, 415; *Pond v. Cummins*, 50 Conn. 372; *Cothran v. Marinduke*, 60 Tex. 370; *Cassidy v. Hall*, 97 N. Y. 159; *Sodiker v. Applegate*, 24 W. Va. 411; 49 Am. Rep. 252; *Halliday v. Bridewell*, 36 La. Ann. 238; *Wass v. Atwater*, 33 Minn. 83. A contract between agricultural laborers and their employer, by which they share in the products of the farming and the expense of conducting it, does not constitute a partnership: *Randle v. State*, 49 Ala. 14; *Christian v. Crocker*, 25

Ark. 327; 99 Am. Dec. 223. Partnership is not created by the fact that one party agrees to furnish the goods and pay all expenses, and another party agrees to transact the business for one half of the profits as compensation: *Bradley v. White*, 10 Met. 303; 43 Am. Dec. 435. Where one person advances funds for carrying on trade, and another furnishes his personal services, for which he is to receive a proportion of the profits, they are partners, both as to themselves and to third persons: *Dob v. Halsey*, 16 Johns. 34; *Wright v. Davidson*, 13 Minn. 449; *Simpson v. Feltz*, 1 McCord Ch. 213; 16 Am. Dec. 602. An agreement which purports on its face to be a copartnership agreement, and which provides that the parties shall share equally in expenses, losses, and gains, cannot be treated as a mere contract of employment: *Smith v. Walker*, 57 Mich. 456. Where one furnishes money to be used in a certain business by the receiver of the reformer's benefit, the receiver to have part of the net profits as compensation for his services, this does not constitute them partners: *Buzard v. Bank*, 67 Tex. 83; 60 Am. Rep. 7.

³ *Donnell v. Harshe*, 67 Mo. 170; *Musser v. Brink*, 68 Mo. 242; *Holloway v. Brinkley*, 42 Ga. 226; *Smith v. Summerlin*, 48 Ga. 425; *Christian v. Crocker*, 25 Ark. 330.

⁴ *Culley v. Edwards*, 44 Ark. 423; 51 Am. Rep. 614.

fixed price, and to allow the seller a certain portion of the profit of their resale by the purchaser;¹ nor an agreement between two houses to share commissions on sales of goods forwarded by one to the other;² nor an agreement to run a vessel on shore.³ A contract in form a lease does not constitute lessor and lessee partners, because the lessor is to advance money and not to exact rent on certain conditions.⁴ A joint interest in a patent does not make those interested partners.⁵ But persons may be liable as partners to third persons, though as between themselves they are not.⁶ The partnership relation exists, although the conditions of partnership are not understood alike by the partners when persons agree to become partners and actually proceed to carry into execution the joint undertaking or business.⁷

ILLUSTRATIONS. — An agreement was made to carry on a farm, one furnishing the land, outfit, and necessary money, the other furnishing laborers and superintending; half the money furnished to be repaid, and the profits to be divided between them. *Held*, to constitute a partnership: *Reynolds v. Pool*, 84 N. C. 37; 37 Am. Rep. 607. By contract, the owners of certain vessels united in an association to carry passengers and freight for hire, each furnishing a certain capital to the association, and each receiving a certain proportion of the profits. *Held*, that this constituted the owners, as to third persons, commercial partners, and as such liable *in solido* for the debts of the association, although the contract provides that it is not a partnership, and that the associations shall not be bound for the debts of each other: *Cooley v. Broad*, 29 La. Ann. 345; 29 Am. Rep. 332. N. and L. agreed that L. should advance twelve thousand dollars to commence erecting a house on land held by N. under lease; that N. should then convey a half-interest in the property to L.; that both should finish the building at a cost of eighteen

¹ *Donley v. Hall*, 5 Bush, 549; *Edwards v. Tracy*, 62 Pa. St. 374. One who lends money for the benefit of a business, to be refunded absolutely without regard to the profits, is not rendered liable to creditors as a partner merely because he is to receive a share of the profits: *Eager v. Crawford*, 76 N. Y. 97.

² *Pomeroy v. Sigerson*, 22 Mo. 177.

³ *The Daniel Kane*, 35 Fed. Rep. 785.

⁴ *Augusta Bank v. Bones*, 75 Ga. 246.
⁵ *Parkhurst v. Kinsman*, 1 Blatch. 488.

⁶ *Allen v. Dunn*, 15 Me. 292; 33 Am. Dec. 615; *Ellsworth v. Tartt*, 26 Ala. 733; 62 Am. Dec. 749. See *post*.

⁷ *Cook v. Carpenter* 34 Vt. 121; 80 Am. Dec. 670.

thousand dollars each, and should divide the rents received from it thereafter. *Held*, that N. and L. were copartners: *Laffan v. Naglee*, 9 Cal. 662; 70 Am. Dec. 678. By an agreement between P. and L., L. was to furnish the necessary machinery for raising a sunken steamer, and P. the necessary labor, the raised material to be sold by L. for their joint account, L. first to repay P. the amounts paid by him. *Held*, to constitute them partners, both *inter sese* and as to third persons: *Lynch v. Thomson*, 61 Miss. 354. W. leased to B. for five years a manufactory, B. to furnish capital and personal labor, the net profits to be shared by the parties, the accounts to be open to the inspection of W., and periodical settlements to be made. *Held*, to constitute a partnership: *Wood v. Beath*, 23 Wis. 254. C. and D. agreed in writing that D. should furnish a stock of goods and shop fixtures valued at four thousand dollars; that C. should pay rent for the shop, manage the shop and pay D. interest on half the four thousand dollars, and that they should divide the profits equally. *Held*, that they were partners as to third persons, notwithstanding an oral agreement between themselves that C. should receive the moiety of the profits instead of a salary: *Brigham v. Clark*, 100 Mass. 430. One who had been sent by Kansas creditors of a merchant of Salt Lake City to collect their claims had arranged with him with their consent to take payment in flour, salt, etc., ship the same to Montana, and there sell the same; but owing to a decline in prices the venture resulted in a loss. *Held*, that the creditors became partners, and should share the loss *pro rata*: *Stettauer v. Carney*, 20 Kan. 474. Members of an unincorporated association described as "stockholders," in their written agreement to take a certain number of "shares" at a certain price per share for the purpose of starting a grocery store, supposed that their losses were limited to the amount of their shares. *Held*, nevertheless, to be partners between themselves: *Farnum v. Patch*, 60 N. H. 294; 49 Am. Rep. 313. An agreement provided that the party of the first part should obtain in his own name, but for the joint account of himself and the parties of the second part, a lease of a railroad, and manage the same at a designated salary, for their mutual benefit; and that the parties of the second part should furnish the money necessary to carry out the enterprise, to be reimbursed, with interest, out of its annual profits; and then declared that after the payment of the capital thus invested and interest, the annual profits should be equally divided between all the parties, and that all losses should be equally borne between them. *Held*, that the agreement constituted a partnership: *Beauregard v. Case*, 91 U. S. 134. H. loaned money to a firm to be used in its business, on the agreement that he was to receive one third of the profits half-yearly,

and at the end of the year become a partner, if agreeable to the parties. He had no control over the business, and never, in fact, received any profits or interest on his loan. *Held*, that he was a partner as to creditors of the firm, and liable for its debts: *Leggett v. Hyde*, 58 N. Y. 272; 17 Am. Rep. 244. Defendant loaned money to A, and took therefor a promissory note payable with interest in three years, and an agreement that in consideration of the trouble and expense in procuring the money loaned, A would pay him, defendant, such further sum annually, as, with the interest, would be equal to one sixth of the annual net profits of A's business. *Held*, that defendant was liable as partner to a business creditor of A: *Parker v. Canfield*, 37 Conn. 250; 9 Am. Rep. 317. Three persons owned and ran a saw-mill jointly, on the agreement that one of them was to conduct its operations, pay all its expenses from the proceeds, and divide the net profits equally between the three. *Held*, a partnership: *Camp v. Montgomery*, 75 Ga. 795. H. and E. made an agreement whereunder H. was to look up desirable lands, and bid them in at tax sales, E. furnishing the money. Both were to control alike the subsequent disposition of the lands, and, after E. was repaid his advances, profits were to be divided equally. The community of interest extended to both profit and loss. Titles were to be taken in E.'s name. *Held*, that there was a partnership: *Hunt v. Erikson*, 57 Mich. 330. A father supplied all the capital while his sons shared the net profits; the father stated that he could discharge his sons when he saw fit. *Held*, not conclusive against the existence of the partnership: *Whiting v. Leakin*, 66 Md. 255. A merchant is indebted to several creditors, and they enter into an arrangement with him, by which the trade is to be conducted under their superintendence, and they are to be gradually paid off out of the profits. These creditors do not thereby become partners of the debtor in his trade, or liable for the debts of the concern; for "the real ground of the liability," where such liability exists, "is, that the trade has been carried on by persons acting on his behalf": *Cox v. Hickman*, 8 H. L. Cas. 268. A partnership is entered into for a term certain, and it is provided by a clause in the articles that if a partner dies before the end of the term, his representatives shall, during the rest of the term, receive the share of profits he would have been entitled to if living; a partner having died, his share of profits is paid from time to time to his executors, under this agreement. The executors do not thereby become partners: *Holme v. Hammond*, L. R. 7 Ex. 218. The business of an underwriter is conducted by A in the name of B, and A receives a fixed salary and one fifth of the profits, subject, as to this one fifth, to be wholly or partially refunded in the event of unexpected losses becoming known

after the division of profits in any year. The contract between A and B is not one of partnership, but of hiring and service: *Ross v. Parkyns*, 20 Eq. 331. An agreement was made to lend money and indorse to a certain amount for the purpose of the borrower's business, in consideration of a certain percentage of the net profits of that business. *Held*, not to constitute the parties partners, as between themselves or as to third persons: *Boston and Colorado Smelting Co. v. Smith*, 13 R. I. 27; 43 Am. Rep. 3. An advance of money was made to purchase and erect buildings, for interest and one half the profits of sale, which the receivers guaranteed at a certain amount, the advances and profits being secured by mortgage. *Held*, not to constitute the party advancing a partner as to third persons: *Curry v. Fowler*, 87 N. Y. 33; 41 Am. Rep. 343. An agreement was made between two members of a partnership and a third person, with the knowledge and assent of the other partners, that the third person should share in a certain proportion in the profits and losses of the two contracting partners in the partnership business. *Held*, not to make such third person a partner, or liable for the partnership debts: *Burnett v. Snyder*, 81 N. Y. 550; 37 Am. Rep. 527. An agreement was entered into by which the plaintiff was to render service for the defendant in a factory which he had recently become owner of, at a fixed annual compensation. The defendant was (if the encumbrances on the property were paid as they became due from the profits of the business and the plaintiff's notes, on demand given at the same time), to convey to the plaintiff one half of the property and business, and not otherwise. *Held*, not a partnership: *Haskins v. Burr*, 106 Mass. 48. An administrator advanced money to enable the person receiving it to cut and remove from the estate certain logs under an agreement that the party should, after selling them, pay the money advanced and pay the stumpage, and then divide with the estate the balance of the money realized. *Held*, that this transaction did not amount to a partnership: *Ford v. Smith*, 27 Wis. 261. A writing "received of G. two thousand dollars to invest in wool, said G. to receive two thirds of the net profits on the sale of the wool, and O. one third, signed O." *Held*, not to establish a partnership, there being no provision for sharing losses: *Ruddick v. Otis*, 33 Iowa, 402. Certain cattle were delivered to plaintiff and two other persons to be kept for a time, at the expiration of which they were to be sold by defendant. After deducting the first cost of the cattle, defendant was to retain one half of the remainder of the proceeds, the other half to be equally divided between the plaintiff and the other persons. *Held*, that in this there was no partnership, for there was no community of profit and loss, or of ownership in the subject of the contract: *Beckwith v. Talbot*,

2 Col. 639. D. bought cattle through N. who was his agent in the name of N., the agreement being that N. should butcher and sell the meat, and out of the proceeds return to D. the cost and one fourth of a cent per pound of dressed meat additional, and that N. should have the balance. *Held*, that this did not constitute any partnership whatever: *Dale v. Pierce*, 85 Pa. St. 474. Three brothers, who had entered into a partnership under articles for a definite time, agreed in writing, indorsed on the articles, to continue the partnership for two years, "subject to a charge of twelve per cent of the net profits" to a former clerk, "in lieu of the salary heretofore allowed him." *Held*, that this did not make the clerk a partner: *Sangston v. Hack*, 52 Md. 173. One merely hired the use of another's hotel from day to day, paying daily a sum equal to one third of the gross receipts and gross earnings. *Held*, no partnership: *Beecher v. Bush*, 45 Mich. 188; 40 Am. Rep. 465. N. furnished money to P. to conduct business. The latter was to let him have goods at cost prices, and nothing was said as to interest or profit and losses. *Held*, a loan, and not to constitute N. and P. partners: *Slade v. Paschal*, 67 Ga. 541. A and B, farmers, purchase a thrashing-machine in common, which they operate together, and for which they gave the vendors a note signed by both individually. *Held*, that they are joint owners and not partners: *Iliff v. Brazill*, 27 Iowa, 131; 99 Am. Dec. 645. A corporation owned an undeveloped marble-quarry. Plaintiffs were its principal stockholders. They made with the corporation a contract, under which the corporation was to quarry and deliver on the cars its marble, and to pay one half the expense of removing it to plaintiff's mill. Plaintiffs were to build a mill, manufacture and sell the marble, collect the proceeds, and divide them equally between themselves and the corporation. *Held*, that no partnership was thus created: *Flint v. Eureka Marble Co.*, 53 Vt. 669. One raises a crop on another's land, the landlord furnishing teams and feed and the tenant supplying the labor, with the agreement to divide the gross product equally. *Held*, not to constitute a partnership: *Day v. Stevens*, 88 N. C. 83; 43 Am. Rep. 732. Several independent railway companies whose lines connected agreed each to carry over its own road the freight-cars of the others, marked "Green Line" without breaking bulk, at certain rates, each fixing and collecting its own rates over its own road, and having no interest in other freights. In fixing its own rate or through-freight, each company would ascertain the rates charged by the other companies, and add them to the rates for its own line. These were called "Green Line rates." There was no joint expense or loss or profit, but if a loss could not be traced to any particular road, it was borne by all the carrying roads. *Held*, that this did not con-

stitute a partnership, and the use of the words "Green Line" on bills of lading and a wharf-boat did not estop the companies: *Irvine v. R. R. Co.*, 92 Ill. 103; 34 Am. Rep. 116. A partnership agreed with H. to manufacture two hundred wagons for him, he advancing fifty dollars on each, the wagons to be sold, and H. to receive one fourth of the profits, and interest on the advances at five and a quarter per cent. *Held*, that this did not make H. a partner: *Richardson v. Hughitt*, 76 N. Y. 55; 32 Am. Rep. 267. An arrangement between B and C for "mutually keeping house," by which C is to pay the house rent and butcher's bill, and B is to pay the other bills for the family expenses, *held*, not as matter of law to make B and C partners, or authorize C to bind B to third parties for the rent: *Austin v. Thomson*, 45 N. H. 113. Two joint owners of a horse entered into a written contract by which one was to keep the horse for a certain time for a certain price, half of which was to be paid by the other. *Held*, that they were not partners, although so calling themselves in the contract, and that an action would lie on the contract by one against the other: *Oliver v. Gray*, 4 Ark. 425. Two wool firms agreed to furnish each a stated proportion of a quantity of wool, to be sold to a certain vendee, and to share profits and loss in the transaction. *Held*, that they were not partners *inter sese* in the transaction, and could not jointly sue the vendee for non-fulfillment of the contract: *Snell v. De Land*, 43 Ill. 323. A partner disposed of his share of the good-will, and the new firm agreed to allow him a percentage upon the gross sales of the firm. *Held*, that this percentage did not constitute him a member of the new firm: *Gibson v. Stone*, 43 Barb. 285; 28 How. Pr. 468. By agreement one is to furnish a circular saw-mill and men and horses to keep it in operation, and another is to furnish the logs, and feed for the hands and horses, the lumber to be equally divided between them. *Held*, not to constitute a partnership: *Stoallings v. Baker*, 15 Mo. 481. A agreed to advance money to B, from time to time, up to a certain amount, to enable B to carry on business; and B agreed to pay interest to A on the average balance advanced, and also to divide the profits after deducting a fixed sum for expenses; but A was not to bear any losses. *Held*, that A and B were not partners as to third persons: *Smith v. Knight*, 71 Ill. 148; 22 Am. Rep. 94. An agreement between manufacturers and a banker, whereby the latter was to furnish the former money, wherewith to manufacture as many articles as they might think safe and profitable, one third of the profits to be paid in lieu of interest on the money loaned, but no provision being made for his bearing any expense or loss, nor any time fixed for the termination of the adventure. *Held*, not to constitute a partnership: *Lintner v.*

Millikin, 47 Ill. 178. An agreement between A, B, and C that the firm business be carried on as before, except that for the next two years A be released from all active responsibility therein, and have no pecuniary interest or liability, but a right to a reasonable inspection of the books, B and C meanwhile sharing between themselves all profits and losses, *held*, to render A merely a joint owner, and not a partner: *Sailors v. Nixon-Jones Printing Co.*, 20 Ill. App. 509. A advanced money to B, taking notes therefor, it being agreed that A might, if he chose, become B's partner, and that the money advanced should be A's contribution. B refused to recognize A as a partner. *Held*, in A's action against B on the notes, that a finding that no partnership ever was formed was justified: *Morrill v. Spurr*, 143 Mass. 257. Articles of copartnership provided that if a partner should die during the term his capital should remain therein until its expiration. The sum standing to the credit of a partner who died continued in the business, his executors not participating, but simply examining the books and accounts from time to time. They received no profits, and did not withdraw their testator's capital. *Held*, that they were not liable as partners to one who, after their testator's death, sold goods to the firm: *Wild v. Davenport*, 48 N. J. L. 129; 57 Am. Rep. 552.

§ 641. **Secret or Dormant Partners.**—A silent, secret, or dormant partner is a person who participates in the profits of the business while concealing his name from the public, and his interest in the firm. Such partners, when discovered, are equally liable upon the firm engagements as if their names had never been concealed, although they were not known by the creditors to be partners at the time of the creation of the debt.¹ A secret partner is not responsible for debts of the firm contracted after his actual retirement from it, provided, however, he has throughout his connection with the partnership preserved strictly his *incognito*. If he has, no notice of dissolution or retirement is necessary to terminate his responsibility;² if he has not, if any person

¹ 1 Schouler on Personal Property, sec. 177; *Reynolds v. Cleveland*, 4 Cow. 282; 15 Am. Dec. 369; *Brooke v. Washington*, 8 Gratt. 243; 56 Am. Dec. 142; *National Bank v. Thomas*, 47 N. Y. 19; *Speake v. Prewitt*, 6 Tex. 253; *Mitchell v. Dall*, 2 Har. & G. 171; *Winship v. United States Bank*, 5 Pet. 529; *Richardson v. Farmer*, 36 Mo. 35; 88 Am. Dec. 129.

² *Scott v. Colmesnil*, 7 J. J. Marsh. 416; *Kolley v. Hurlburt*, 5 Cow. 534;

dealing with the firm knows that he is interested in it as a secret or dormant partner, as to that person he is a general partner, and to him he would be liable for debts contracted by the partnership after his retirement, unless special notice were given to such supposed creditor of the retirement from the firm of the dormant partner.¹ A dormant partner is not personally liable for the payment of judgments against the ostensible partner alone.² Dormant partners have the same powers as other partners.³ One whose relations to a copartnership are expressed in the "& Co.," is not a dormant partner, but a general partner.⁴

ILLUSTRATIONS.—B. and C., under the firm name of C. & B., ostensibly in carrying on a retail store in Baltimore bought goods of M. on credit, shipped them thither, deposited them in warehouses, and under various fictitious names secretly shipped them in the original packages to G., who used the same names in reshipping and selling them. *Held*, that G. was a dormant partner, and, as such, was liable to M., notwithstanding the fact that M. sold the goods in ignorance of G.'s interest: *Gilmore v. Merritt*, 62 Ind. 525. S. loaned money to be invested in business by C., and agreed to take in lieu of an interest therein a certain share of the profits of the business. *Held*, that persons who became creditors of C. after this arrangement was ended, and who had never heard of it, could not hold S. as a partner: *Swann v. Sanborn*, 4 Woods, 625. There were two firms of the same name in the same community composed of the same persons, but each engaged in different kinds of business, one of them containing a dormant partner, and the other not. *Held*, that a promissory note signed by the firm name was presumably that of the firm not containing the dormant partner: *Fosdick v. Van Horn*, 40 Ohio St. 459. When a partnership note was given, A was a silent partner. . Before the note matured A retired, but no notice of the fact was given. On the

Evans v. Drummond, 4 Esp. 89; *Armstrong v. Hussey*, 12 Serg. & R. 315; *Benton v. Chamberlain*, 23 Vt. 711; *Kennedy v. Bohannon*, 11 B. Mon. 120; *Ayrault v. Chamberlin*, 26 Barb. 89; *Warren v. Ball*, 37 Ill. 76; *Ellis v. Bronson*, 40 Ill. 455; *Grosvenor v. Lloyd*, 1 Met. 19; *In re McMannus*, 7 Irish Ch. 82; *Deford v. Reynolds*, 36 Pa. St. 325.

¹ *Carter v. Whalley*, 1 Barn. & Adol. 11; *Farrar v. Definne*, 1 Car. & K. 580; *Edwards v. McFall*, 5 La. Ann. 167; *Nussbaumer v. Becker*, 87 Ill. 281; 29 Am. Rep. 53.

² *How v. Kane*, 2 Pinn. 531; 54 Am. Dec. 154.

³ *Story on Partnerships*, sec. 103.

⁴ *Podrasnik v. R. T. Martin Co.*, 25 Ill. App. 300.

maturity of the note a new one was given in the same firm name. There was no evidence of an agreement that this note should be deemed payment of the old one. *Held*, that A was liable for the debt represented by the note: *Pueblo Bank v. Newton*, 10 Col. 161.

§ 642. Partners by "Holding out" as Such.—Where a man holds himself out as a partner in a particular firm, or allows others to do it for him, he becomes thereby liable as a partner to any one who has, on the faith of such representation, given credit to the firm. In other words, he is estopped to deny that he is a partner.¹ There may be a "holding out" without any direct communication, by words or conduct, between the parties. One who makes an assertion intending it to be repeated and acted upon, or even under such circumstances that it is likely to be repeated and acted upon, by third persons, will be liable to those who afterwards hear of it and act upon it. "If the defendant informs A B that he is a partner in a commercial establishment, and A B informs the plaintiff, and the plaintiff, believing the defendant to be a member of the firm, supplies goods to them, the defendant is liable for the price."² But it is essential that the party's name was used with his knowledge. The use of a man's name without his knowledge cannot make him a partner.³ So the use of his name must have been known to the person who seeks to make him liable.⁴ If a married woman on hearing that a firm is using her name forbids it, and never hears that her prohibition is violated, she is not estopped to deny that she is a part-

¹ *Osborne v. Brennan*, 2 Nott & McC. 427; 10 Am. Dec. 614; *Spears v. Toland* 1 A. K. Marsh. 203; 10 Am. Dec. 722; *Crozier v. Kirker*, 4 Tex. 252; 51 Am. Dec. 724; *Burr v. Byers*, 10 Ark. 398; 52 Am. Dec. 239; *Campbell v. Hastings*, 29 Ark. 512; *Carmichael v. Grier*, 55 Ga. 116; *Barrett Line v. Blackmer*, 53 Ga. 98; *In re Jewett*, 15 Bank. Reg. 126; *Shafer v. Randolph*, 99 Pa. St. 250; *Woodward v. Clark*, 30 Kan. 78;

Hancock v. Hurtrager, 60 Iowa, 374; *Grieff v. Boudousquite*, 18 La. Ann. 631; 89 Am. Dec. 698; *Jacobs v. Shorey*, 48 N. H. 100; 97 Am. Dec. 586; *Kritzer v. Sweet*, 57 Mich. 617; *Walker v. Brown*, 66 Tex. 556.

² *Pollock on Partnership*, 24.

³ *1 Lindley on Partnership*, 50.

⁴ *1 Lindley on Partnership*, 50; *Bowie v. Maddox*, 29 Ga. 285; 74 Am. Dec. 61.

ner.¹ Diligence in ascertaining and contradicting the report is not required of one who is held out as a member of a partnership without his knowledge.² A newspaper paragraph stating that a certain person is a member of a certain partnership, but not purporting to be inserted by the partnership, is not admissible in evidence to charge such person as partner merely on proof that he was a subscriber to the paper at the time, and had made no public contradiction of the statement.³ Where it is sought to charge one with the obligations of a partner, on the ground of his having held himself out as such, he must be shown to have done something calculated to create a belief that he was a partner, and to have misled the plaintiff.⁴ A general manager of a firm who with authority uses the firm name in transacting its business, and signs it to a contract which he has personally concluded, is not liable as partner unless he has affirmatively held himself out as such.⁵ Notes given in the name of a partnership to commence at a future day, for goods to form the stock in trade of such partnership, and received upon the credit of an individual intending to become a member of such partnership, are collectible against such member even though the partnership never was actually formed.⁶ A partner who has retired from the firm may be liable, on the principle of "holding out," for debts of the firm contracted afterwards, if he has omitted to give notice of his retirement to the creditors.⁷ But he cannot be thus liable to a creditor of the firm who did not know him to be a member while he was such in fact, and therefore cannot be supposed to have dealt with the firm on the faith of having his credit to look to.⁸ The estate of a deceased

¹ *Rittenhouse v. Leigh*, 57 Miss. 697.

² *Campbell v. Hastings*, 29 Ark. 512; *Poillon v. Secor*, 61 N. Y. 456.

³ *Potter v. Greene*, 9 Gray, 309; 69 Am. Dec. 290.

⁴ *Pringle v. Leverich*, 48 N. Y. Sup. Ct. 90.

⁵ *Thmsen v. Lathrop*, 104 Pa. St. 365.

⁶ *Stiles v. Meyer*, 64 Barb. 77; 7 Lans. 190.

⁷ *Pollock on Partnership*, 25; *Spears v. Toland*, 1 A. K. Marsh. 203; 10 Am. Dec. 722.

⁸ *Carter v. Whalley*, 1 Barn. & Adol. 11.

partner is not liable where after his death his executors allow his name to remain, even though creditors did not know of his death.¹

ILLUSTRATIONS.—P. represented to S. that he was a partner of N., and S. told N. of such representations, and the latter acquiesced in them by silence or otherwise. *Held*, that N. was liable as a partner, and his liability would date from the making of such representations or the first credit given thereunder: *Slade v. Paschal*, 67 Ga. 541. S. & W., partners in a billiard-saloon, dissolved partnership. S., by the dissolution, became sole owner of two billiard-tables, which he allowed to remain in the saloon and permitted W. to advertise as his own. Subsequently W. borrowed money, for which he gave his note and a deed of trust of the tables, the party lending the money supposing the tables belonged to W. *Held*, that S. was precluded from asserting his ownership to the detriment of the lender, because he tacitly assented to the assumed ownership of the property by W.: *Neale v. Sears*, 31 Tex. 105. Four steamboats separately owned constituted together the "Kountz line." They had a common agent. Contracts were always made in the name of the "Kountz line." *Held*, that the owners and their boats were jointly liable for a loss caused by the unseaworthiness of one of the boats: *Sun Ins. Co. v. Kountz Line*, 122 U. S. 583. A and B, copartners, agreed with their salesman C to associate his name with the firm, and to give him a percentage of the sales for his compensation, and that he should not be liable for the debts. They advertised in a newspaper that C was to have an interest in the establishment. *Held*, that a creditor of the firm could not recover against C, without proof that previously to giving credit he knew of the publication, or that defendant held himself out as a partner, and that plaintiff trusted him as partner: *Vinson v. Beveridge*, 3 McAr. 597; 36 Am. Rep. 113. One Harrington gave the plaintiff a note signed "Hill & Co., by Harrington." There never existed any such firm as "Hill & Co.," nor were Hill and Harrington ever partners; but some time before the note was given, Hill was informed that Harrington was using his name, and he thereupon told Harrington that he "must not use that name to injure him," and Harrington said he would not. Hill did not know of the giving of the note to plaintiff, nor did plaintiff know of the previous use by Harrington of Hill's name. *Held*, that Hill was liable on the note: *Smith v. Hill*, 45 Vt. 90; 12 Am. Rep. 189. L. bought a stock of goods, hired a shop in which to carry on business, and permitted W. to carry it on in W.'s name, under an agree-

¹ 1 Lindley on Partnership, 25.

ment that W. should pay all expenses of the business, and always keep a stock of goods on hand equal in value to the amount paid by L., and ultimately pay to L. that amount, and that L. should receive one half of the net profits of the business, and should have a right to secure himself by taking possession at any time. *Held*, that L. was liable for a debt incurred by W. for goods used in carrying on the business, to one who had sold them, relying on the belief that L. was a partner in the business with W.: *Pratt v. Langdon*, 97 Mass. 97; 93 Am. Dec. 60.

§ 643. Liability of Partners for Debts.—Every partner is liable jointly with the other partners, and is also severally liable for all debts and obligations incurred while he is a partner, and in the usual course of the partnership business by or on behalf of the firm.¹ Where the partners are all known, and the existence of the partnership brought home to those dealing with them, the latter may take the individual credit of any member of the firm, if they so choose.² Where one partner purchases goods on his single credit for the use of the partnership, if the seller does not know at the time of the existence of the partnership, he may, when he discovers it, hold the firm liable.³ If credit be given exclusively to one partner, and it appears that it was not intended that the other should be held or looked to for payment, the latter cannot be made liable.⁴

§ 644. Out-going and In-coming Partners.—A partner who retires from a firm, or the estate of a partner who dies, does not thereby cease to be liable for partnership debts contracted before his retirement or death,⁵ and a person who is admitted as a partner into an existing firm does not thereby become liable to the creditors of the firm

¹ Pollock on Partnership, 26; Ward v. Brandt, 11 Mart. (La.) 331; 13 Am. Dec. 353.

² Richardson v. Farmer, 36 Mo. 35; 88 Am. Dec. 129.

³ Griffith v. Buffum, 22 Vt. 181; 54 Am. Dec. 64.

⁴ Smith v. Durrett, Sneed, 236; 2 Am. Dec. 714.

⁵ 1 Lindley on Partnership, 451. Or until he has given notice of his retirement to creditors: Williams v. Bowers, 15 Cal. 321; 76 Am. Dec. 489.

for anything done before he became a partner;¹ but a retiring partner may be discharged from any existing liabilities, and an in-coming partner may become subject thereto by an agreement to that effect between the members of the new firm and the creditor. Such agreement may be either express or inferred as a fact from the course of dealing between the creditors and the new firm.² Partners selling out their interest in the firm to third persons are liable for fraudulent representations of their copartner as to the extent of the assets and liabilities of the firm.³ Where a partnership is dissolved, and one partner purchases the interest of the other in the partnership property, and assumes and agrees to pay the partnership debts, he thereby becomes in equity the principal debtor as to such debts, and the other his surety, and a creditor having notice of such agreement is bound by such relationship.⁴ It is not contrary to equity for partners in an existing firm, upon taking in a new member, to put in the stock and machinery of the old business at a fixed price arbitrarily between the parties as one of the conditions of the new arrangement. There is no confidential relation between parties until the partnership is formed. In the negotiations concerning it the parties deal as strangers.⁵ A promise made to a retiring partner by his former copartner and others forming with the latter

¹ Lindley on Partnership, 404; *Wright v. Brosseau*, 73 Ill. 381; *Fuller v. Rowe*, 59 Barb. 344; *Spannhorst v. Link*, 46 Mo. 197; *Sternberg v. Calanan*, 14 Iowa, 251; *Poindexter v. Waddy*, 6 Munf. 418; 8 Am. Dec. 749; *Adkins v. Arthur*, 33 Tex. 431; *Parmalee v. Wiggenshorn*, 6 Neb. 322; *Kountz v. Holthouse*, 85 Pa. St. 235. Where one comes into an existing firm and agrees that the new firm shall pay the debts of the old one, this agreement cannot be enforced by the creditors of the old firm: *Serviss v. McDonnell*, 107 N. Y. 260.

² Lindley on Partnership, 450. Otherwise he remains bound: *Rawson*

v. Taylor, 30 Ohio St. 339; 27 Am. Rep. 464; *Eagle Mfg. Co. v. Jennings*, 29 Kan. 657; 44 Am. Rep. 668.

³ *Lindmeier v. Monahan*, 64 Iowa, 24.

⁴ *Colgrove v. Tallman*, 67 N. Y. 95; 23 Am. Rep. 99; *Smith v. Sheldon*, 35 Mich. 42; 24 Am. Rep. 529. Where a partner retires and the remaining partner agrees to pay firm debts, the retiring partner has a right of action on the agreement as soon as the other fails to pay, although the retiring partner has sustained no damage so far: *Gillen v. Peters*, 39 Kan. 439.

⁵ *Uhler v. Semple*, 20 N. J. Eq. 238.

a new partnership, that such new firm will pay the debts of the old one, is founded on a sufficient consideration, and is not within the statute of frauds.¹ A retiring partner has no lien on the partnership property when he sells his interest in the firm assets to his copartners, and takes their covenant to indemnify and save him harmless from the liabilities of the firm. He cannot maintain any proceeding in equity to subject such assets to the satisfaction of such debt, especially after they have gone into the hands of a subvendee.² One member of a partnership is not liable for money loaned to another before they became copartners, although knowing that it was borrowed for and afterwards put into the partnership.³ An incoming partner, who has agreed to assume the debts of the old firm, may, when sued by one of its creditors, defend by showing that he was defrauded, and that plaintiff's agent was cognizant of it and connived at it.⁴ Where one buys a half interest in an existing business, under an agreement for partnership between him and the proprietor, the money paid by him does not belong to the partnership, but to the former proprietor; and the new partner cannot complain of its application to the payment of existing debts.⁵ In a suit on a contract with a partnership, it must appear that all who sue were partners at the time of making the contract. One who has been subsequently admitted as a partner cannot join in the action, although it was agreed as between the partners themselves that he should become equally interested with the others in all the existing property and rights of the firm, unless there has been, after the accession of the incoming partner, a new and binding promise to pay to the firm as newly constituted.⁶

¹ *Lee v. Fontaine*, 10 Ala. 755; 44 Am. Dec. 505.

² *Smith v. Edwards*, 7 Humph. 106; 46 Am. Dec. 71.

³ *Baxter v. Plunkett*, 4 Houst. 450.

⁴ *Morris v. Marqueze*, 74 Ga. 86.

⁵ *Ball v. Farley*, 81 Ala. 288.

⁶ *Firemen's Ins. Co. v. Floss*, 67 Md. 403; 1 Am. St. Rep. 398.

ILLUSTRATIONS.—A, B, and C are partners. D is a creditor of the firm. A retires from the firm, and B and C, either alone or together with a new partner, E, take upon themselves the liabilities of the old firm. This alone does not affect D's right to obtain payment from A, B, and C, or A's liability to D: *Lindley on Partnership*, 451. Upon the representation that M. was to be taken into the firm of J. L. B. & Co. at a certain day, in which representations M. joined, the plaintiffs sold and delivered goods for the new firm to be paid for after the day named; the new firm was not formed, and notice of this fact was not given to the plaintiffs who, after the day, took the note of J. L. B. & Co. for the goods. *Held*, that M. was jointly liable with the partners for the goods: *Stiles v. Meyer*, 7 Lans. 190. By a contract of dissolution, it was provided that one partner was to withdraw and be paid a proportion of the profits when the estimates were made. *Held*, that such a one was a partner until the estimates were made: *Magill v. Merrie*, 5 B. Mon. 168. A father sold out his business to his son, who bore the same name. Notice of the change was published in two newspapers of the place. The son continued to use his father's letter-heads and sign, and one day when his father was present, bought a bill of goods of a commercial traveler whose employer knew the father. Nothing in the transactions showed an intention to deceive. *Held*, that the father was not liable for the goods: *Preston v. Foellinger*, 24 Fed. Rep. 680. A bookkeeper of a dissolved firm retained by a new firm, consisting of part of the members of the old firm, *held*, to be entitled to retain funds received from the new firm in payment of the balance of the wages due from the old firm: *Strong v. Niles*, 45 Conn. 52. A firm had received lumber to be sold on commission, but before all of it was sold one of the partners retired, and the other continued the business alone. *Held*, that the retiring partner was jointly liable with the other for proceeds of the lumber subsequently received by the latter: *Briggs v. Briggs*, 15 N. Y. 471.

§ 645. **Power of Partners to Bind Firm.**—Every partner is, in contemplation of law, the general and accredited agent of the partnership, or, as it is sometimes expressed, each partner is *præpositus negotiis societatis*, and may, consequently, bind all the other partners by his acts in all matters which are within the scope and objects of the partnership. Hence, if the partnership be of a general commercial nature, he may pledge or sell the partnership property; he may buy goods on account of the partner-

ship; he may borrow money, contract debts, and pay debts on account of the partnership; he may draw, make, sign, indorse, accept, transfer, negotiate, and procure to be discounted promissory notes, bills of exchange, checks, and other negotiable paper in the name and on account of the partnership.¹ But as each partner is an agent only in and for the business of the firm, his acts beyond and outside his authority as such agent do not bind the firm.² A written contract of partnership in an adventure, limited to certain specified transactions and to some definite duration, does not give to the partners such power to bind the firm as is possessed in cases of permanent and general mercantile transactions.³ A partner's use of the firm name for a purpose entirely distinct from the partnership business is *prima facie* evidence that the act was unauthorized and a fraud upon the partnership, and such evidence must be rebutted by one seeking to hold the other partners bound by the contract, by showing their assent thereto.⁴ Where a partnership is limited to a particular trade or business, one partner cannot bind his copartner by any contract not relating to such trade or business, and third persons will be presumed to have knowledge of the limited nature of the partnership from

¹ Story on Agency, sec. 124; *Sage v. Sherman*, 2 N. Y. 417; *Loudon Savings Fund Society v. Hagerstown Savings Bank*, 36 Pa. St. 498; 78 Am. Dec. 390; *Edwards v. Tracy*, 62 Pa. St. 374; *Congdon v. Morgan*, 13 S. C., N. S., 190; *Selden v. Bank of Commerce*, 3 Minn. 166; *Mauldin v. Branch Bank at Mobile*, 2 Ala. 502; *Johnston v. Dutton*, 27 Ala. 245; *Chandler v. Sherman*, 16 Fla. 99; *Breckinridge v. Shrieve*, 4 Dana, 376, 377; *Heirn v. McCaughan*, 32 Miss. 17; 66 Am. Dec. 588; *Faler v. Jordan*, 44 Miss. 283; *Cadwallader v. Kroesen*, 22 Md. 200; *Chemung Canal Bank v. Bradner*, 44 N. Y. 680; *Knowlton v. Reed*, 38 Me. 246; *Fletcher v. Ingram*, 46 Wis. 191; *Crozier v. Kirker*, 4 Tex. 252; 51 Am. Dec. 724; *Kinsler v. McCants*, 4 Rich. 46; 53 Am. Dec. 711;

Burgan v. Lyell, 2 Mich. 102; 55 Am. Dec. 53; *Western Stage Co. v. Walker*, 2 Iowa, 504; 65 Am. Dec. 789; *Barker v. Mann*, 5 Bush, 672; 96 Am. Dec. 373.

² Story on Agency, sec. 125; *Crough-ton v. Forrest*, 17 Mo. 131; *Eastman v. Cooper*, 15 Pick. 276, 290; 26 Am. Dec. 600; *Jones v. O'Farrell*, 1 Nev. 354; *Cayton v. Hardy*, 27 Mo. 536; *Goode v. Linecum*, 1 How. (Miss.) 281; *Liv- ington v. Roosevelt*, 4 Johns. 231; 4 Am. Dec. 273; *Mercien v. Mack*, 10 Wend. 461; *Nichols v. Hughes*, 2 Bail. 109; *Brooks v. Hamilton*, 10 Mart. (La.) 285; 13 Am. Dec. 329; *Louden Sav. Soc. v. Savings Bank*, 36 Pa. St. 498; 78 Am. Dec. 390.

³ *Toof v. Duncan*, 45 Miss. 48.

⁴ *Eastman v. Cooper*, 15 Pick. 276; 26 Am. Dec. 601.

the circumstances connected with the business of the firm.¹ A partner exceeding his authority in making a contract is personally liable on it.² A partner entering into a contract in the name of the firm is estopped to deny his authority.³ But the implied authority of one partner may be revoked by the copartner by notice to parties dealing with him.⁴ A partner ratifies an act of a copartner not within the scope and usage of the partnership, in purchasing property on the firm credit, by obtaining possession and selling it as firm property.⁵ A note given by a partner in his individual name cannot be enforced against the partnership, although the firm has received the consideration.⁶ The partnership is not liable where the credit is given to the individual partner, and not to the firm.⁷ A partner alone is liable upon all contracts made by himself upon his own exclusive credit.⁸

§ 646. What is and What is not within the Implied Power of Partners.—Each partner has an implied power to borrow money;⁹ assign a debt due the firm;¹⁰ compromise a debt due to the firm;¹¹ dispose of the whole firm

¹ *Livingston v. Roosevelt*, 4 Johns. 251; 4 Am. Dec. 273.

² *Skinner v. Dayton*, 19 Johns. 513; 10 Am. Dec. 286.

³ *Smith v. Kemper*, 4 Mart. (La.) 409; 6 Am. Dec. 708.

⁴ *Leavitt v. Peck*, 3 Conn. 125; 8 Am. Dec. 157.

⁵ *Porter v. Curry*, 50 Ill. 319; 99 Am. Dec. 520.

⁶ *Holmes v. Burton*, 9 Vt. 252; 31 Am. Dec. 621; see *Harris v. Miller*, Meigs, 158; 33 Am. Dec. 138; nor where one partner accepts a bill drawn on the partnership in his own name: *Heenan v. Nash*, 8 Minn. 407; 83 Am. Dec. 790.

⁷ *Willis v. Hill*, 2 Dev. & B. 231; 31 Am. Dec. 412.

⁸ *North Penn. Coal Co.'s Appeal*, 45 Pa. St. 181; 84 Am. Dec. 487.

⁹ *Bank v. Breillat*, 6 Moore P. C. 194; *Winship v. Bank*, 5 Pet. 529; *Etheridge v. Binney*, 9 Pick. 272;

Whitaker v. Brown, 16 Wend. 505; *Church v. Sparrow*, 5 Wend. 223; *Miller v. Manice*, 6 Hill, 115, 119; *Roney v. Buckland*, 4 Nev. 45; *Stockwell v. Dillingham*, 50 Me. 442; 79 Am. Dec. 621; *Beaman v. Whitney*, 20 Me. 413; *Bascom v. Young*, 7 Mo. 1; *Leffler v. Rice*, 44 Ind. 103; *Dillon v. McKrae*, 40 Ga. 107; *Kleinhaus v. Generous*, 25 Ohio St. 667; *McKee v. Hamilton*, 33 Ohio St. 7; *Steel v. Jennings*, Cheves, 183. A partner cannot, by borrowing money on his own account, make the firm liable, even though he states to the lender that the money is to be used in the business of the firm: *Ah Lep v. Gong Choy*, 13 Or. 205.

¹⁰ *Quiner v. Ins. Co.*, 10 Mass. 476; *Lamb v. Durant*, 12 Mass. 56; 7 Am. Dec. 31.

¹¹ *Cunningham v. Littlefield*, 1 Edw. Ch. 104; *Patch v. Wheatland*, 8 Allen, 102; *Nelson v. Wheelock*, 46 Ill. 25.

property for any purpose within the scope of the partnership;¹ execute a chattel mortgage to secure a debt due from the firm;² give releases and receipts;³ insure the property;⁴ or make, indorse, issue, and accept negotiable paper.⁵ The members of a mining partnership may bind one another in matters which one dealing with them might fairly presume to be within the scope of the business, not, perhaps, by a promissory note, but by dealings on credit

¹ *Clark v. Rives*, 33 Mo. 579; *Cul-lum v. Bloodgood*, 15 Ala. 34; *Knowl-ton v. Reed*, 38 Me. 246; *Woodward v. Cowing*, 41 Me. 9; *Hennessey v. Western Bank*, 6 Watts & S. 310; *Clark v. Wilson*, 19 Pa. St. 414; *Hal-stead v. Shepard*, 23 Ala. 558; *Arnold v. Brown*, 24 Pick. 89; *Fromme v. Jones*, 13 Iowa, 474; *Ilyrschfelder v. Keyser*, 59 Ala. 338; *Anderson v. Tompkins*, 1 Brock. 456; *Quiner v. Marblehead Ins. Co.*, 10 Mass. 476, 482; *Grasse v. Stellwagen*, 25 N. Y. 315; *Mabbett v. White*, 12 N. Y. 444. A partner may transfer the whole stock in trade of the partnership *bona fide* in payment of the debts of the firm, especially where his copartner has absconded, and the fact that the assignment is under seal is immaterial: *Deckard v. Case*, 5 Watts, 22; 30 Am. Dec. 287. One partner has no power, while his copartners are at hand, to make a general assignment without their consent. Their subsequent ratification will not cut off intervening rights; and where a copartner, while not actively objecting, refused to assent, and did not assent until after service of garnishment process on the assignee, the garnishing creditor's right is an intervening right not cut off by the ratification: *Coleman v. Darling*, 66 Wis. 155; 57 Am. Rep. 253. Where one partner undertakes to sell the entire stock, if the other acquiesces or declines to enforce his equitable rights, a partnership creditor cannot attack the sale except on grounds which would avoid a sale by the partnership: *Ellis v. Allen*, 80 Ala. 515.

² *Willett v. Stringer*, 17 Abb. Pr. 152; *Switzer v. Mead*, 5 Mich. 107; *Milton v. Mosher*, 7 Met. 244; *Gates v. Bennett*, 33 Ark. 475; *Woodruff v. King*, 47 Wis. 261; *Nelson v. Wheelock*,

46 Ill. 25. *Aliter*, for his individual debt: *Smith v. Andrews*, 49 Ill. 28; *Binns v. Waddill*, 32 Gratt. 538; *Rogers v. Batchellor*, 12 Pet. 221. A lease by one partner of partnership realty to be binding on the other partners must be made in the prosecution of the partnership business, and where the making of the lease is in the exercise of an authority necessarily implied from the nature and object of the partnership: *Mussey v. Holt*, 24 N. H. 248; 55 Am. Dec. 234.

³ *Stead v. Salt*, 3 Bing. 103; *Yandes v. Lefavour*, 2 Blackf. 371; *Saleum v. Davis*, 4 Binn. 375; 5 Am. Dec. 410; *Allen v. Cheever*, 61 N. H. 32.

⁴ *Foster v. United States Ins. Co.*, 11 Pick. 85; *Hooper v. Lusby*, 4 Camp. 66.

⁵ 1 *Lindley on Partnership*, 280; *Kimbro v. Bullett*, 22 How. 256; *Wagner v. Simmons*, 61 Ala. 143; *Tolman v. Hanrahan*, 44 Wis. 133; *Porter v. White*, 39 Md. 613; *Wagner v. Freschl*, 56 N. H. 495; *National Bank v. London*, 66 Barb. 193; *Mechanics' Bank v. Foster*, 44 Barb. 87; *Blodgett v. Weed*, 119 Mass. 215; *Faler v. Jordan*, 44 Miss. 283; *Windham Co. Bank v. Kendall*, 7 R. I. 77; *Davis v. Allen*, 3 N. Y. 172; *Smith v. Lusher*, 5 Cow. 688; *Beaman v. Whitney*, 20 Me. 413; *Jemison v. Dearing*, 41 Ala. 283; *Hickman v. Kunkle*, 27 Mo. 401; *Burgess v. Northern Bank of Kentucky*, 4 Bush, 604; *Zuel v. Bowen*, 78 Ill. 234; *Wright v. Brosseau*, 73 Ill. 381; *Ensinger v. Marvin*, 5 Blackf. 210; *Miller v. Hines*, 15 Ga. 197; *Potter v. Price*, 3 Pittsb. Rep. 136; *Hawes v. Dunton*, 1 Bail. 146; 19 Am. Dec. 663; *Exchange Bank v. White*, 30 Fed. Rep. 412. But not to give a note for a debt barred by limitation: *Newman v. Mo-Comas*, 43 Md. 70.

for working the mine.¹ A partnership in the business of buying and slaughtering cattle for sale is a commercial one, each member of which may draw, accept, or indorse bills of exchange in the firm name and business; the other members' repudiation is immaterial to the party dealing therewith.² A partnership for the practice of medicine does not authorize one of the partners to bind the firm by a note given in the name of the partnership for money borrowed for the private and individual use of the partner by whom the note was given.³ A note given in the name of the firm by one partner for his own private debts, and known to be so given by the person taking it, does not bind the other partners, unless they were previously consulted and consented to the transaction.⁴ The members of a firm engaged in the insurance, real estate, and collecting business, have no implied power to bind each other by commercial paper in the name of the firm. Such power can only arise from consent, ratification, custom, or necessity.⁵ Attorneys at law who are partners in the practice of their profession have no authority to bind the firm by becoming parties to negotiable instruments, unless such authority is given by the terms of partnership, or expressly given or recognized by both, or may be implied from the general habits of the partners in their business transactions.⁶ A member of an uncommercial partnership, as for instance an ordinary partnership, for planting or farming, does not have power to bind his copartners by making a promissory note in the partnership name.⁷ A firm engaged in the business of conducting a theater is not a commercial partnership, and a member of such a firm has no

¹ *Manville v. Parks*, 7 Col. 128. Where a member of a mining partnership with authority to do so purchases on credit articles necessary to the business, the copartners will be bound thereby: *Higgins v. Armstrong*, 9 Col. 38.

² *Wagner v. Simmons*, 61 Ala. 143.

³ *Crosthwait v. Ross*, 1 Humph. 23; 34 Am. Dec. 613.

⁴ *Lanier v. McCabe*, 2 Fla. 32; 48 Am. Dec. 173.

⁵ *Deardorf v. Thacher*, 78 Mo. 128; 47 Am. Rep. 95.

⁶ *Friend v. Duryee*, 17 Fla. 111; 35 Am. Rep. 89.

⁷ *McCrary v. Slaughter*, 58 Ala. 230.

implied authority to give a firm note for borrowed money.¹ And the partner has no authority to give or accept a bill or note of the firm for his individual debt.² But where the holder is ignorant of the nature of the consideration, the firm is bound.³ It is a presumption of law, when a member of a firm gives a note in the firm name, that such note was given for partnership purposes, and the burden of proof is on the firm to show the contrary.⁴ But when the firm is a non-trading partnership, it lies upon the holder to show that the note was given by the authority of the other partners.⁵ And where the infirmity appears upon the note, or is known to the holder, it is incumbent upon him to show that the firm were interested in the loan, or that the partners consented to the use of their names.⁶ One who is member of several firms may draw and indorse the same paper as the representative of each.⁷ After public dissolution, the members of a partnership are not liable upon negotiable paper made and indorsed without their knowledge in the name of the firm, although the proceeds have been applied to the partnership debts.⁸ But unless the fact of dissolution is made public, the firm will be liable.⁹ A surviving partner could not convey a bill or note by indorsement.¹⁰ But

¹ *Pease v. Cole*, 53 Conn. 53; 55 Am. Rep. 53.

² *Brown v. Duncanson*, 4 Har. & M. 350; 1 Am. Dec. 409; *Poindexter v. Waddy*, 6 Munf. 418; 8 Am. Dec. 749; *Taylor v. Hillyer*, 3 Blackf. 433; 26 Am. Dec. 430.

³ *Potter v. Dillon*, 7 Mo. 228; 37 Am. Dec. 185; *Flemming v. Prescott*, 3 Rich. 307; 45 Am. Dec. 766.

⁴ *Carrier v. Cameron*, 31 Mich. 373; 18 Am. Rep. 192; *Silverstein v. Atkinson*, 45 Miss. 81; *Fireman Ins. Co. v. Bennett*, 5 Conn. 574; 13 Am. Dec. 109. Presumably, that is partnership paper which is signed as such by a member of the firm: *Feurt v. Brown*, 23 Mo. App. 332.

⁵ *Smith v. Sloan*, 37 Wis. 285. One partner can bind his copartner by note in name of firm in those partnerships only that are engaged in a trade or

concern in which the issuing or transfer of bills is necessary or usual, unless express authority for the purpose is given: *Lanier v. McCabe*, 2 Fla. 32; 48 Am. Dec. 173.

⁶ *Bank of Rochester v. Bowen*, 7 Wend. 158; *Wilson v. Williams*, 14 Wend. 146; *Livingston v. Roosevelt*, 4 Johns. 251; 4 Am. Dec. 273.

⁷ *Miller v. Bank*, 48 Pa. St. 514; 88 Am. Dec. 475.

⁸ *Haven v. Goodell*, 1 Disn. 27; *Perlin v. Keene*, 19 Ma. 355; *Woodworth v. Downee*, 13 Vt. 522; and see *Parker v. Macomber*, 18 Pick. 505; *Fellows v. Wyman*, 33 N. H. 351.

⁹ *Pecker v. Hall*, 14 Allen, 532; *Moore v. Lackman*, 52 Mo. 323; *Davis v. Allen*, 3 N. Y. 172; *Vernon v. Manhattan Co.*, 17 Wend. 524.

¹⁰ *Cavitt v. James*, 39 Tex. 189.

after the dissolution of the firm, the liquidating partner may borrow money to pay a firm debt and give the firm note for it; but any member cannot do so without the consent of the others.¹

So a partner has an implied power to mortgage (by equitable mortgage) the real estate and chattels real of the firm,² or by a chattel mortgage, the personalty;³ pledge the goods and chattels of the firm;⁴ purchase goods necessary or usual for the business;⁵ receive payment of firm debts;⁶ sell the goods or property of the firm.⁷ The managing partner of a firm is authorized to allow a clerk of the firm to buy clothing for himself, and charge it to the account of the firm, so as to bind the firm to the seller.⁸

But a partner has *no* implied power to confess a judgment against a copartner, or so as to bind any one but himself;⁹ or apply the partnership property to the payment of his individual debt.¹⁰ It has been held in some cases that the fact that the separate creditor who receives the partnership property did not know of the misapplica-

¹ *McCowin v. Cubbison*, 72 Pa. St. 358; *Lloyd v. Thomas*, 79 Pa. St. 68; *Randolph v. Peck*, 1 Hun. 138; *Rice v. Goodenow*, Tappan, 94.

² *Pollock on Partnerships*, 33.

³ *Tapley v. Butterfield*, 1 Met. 515; 35 Am. Dec. 375.

⁴ 1 *Lindley on Partnerships*, 301, 311.

⁵ 1 *Lindley on Partnerships*, 301; *Bond v. Gibson*, 1 Camp. 185.

⁶ 1 *Lindley on Partnerships*, 288; *Gregg v. James*, Breese, 143; 12 Am. Dec. 151.

⁷ 1 *Lindley on Personal Property*, 301, 311; *Montjoy v. Holden*, Litt. Sel. Cas. 447; 12 Am. Dec. 331; *Wright v. Boynton*, 37 N. H. 9; 72 Am. Dec. 319. Even the whole at a single sale: *Arnold v. Brown*, 24 Pick. 89; 35 Am. Dec. 296; *Wells v. Mitchell*, 1 Ired. 484; 35 Am. Dec. 757; *Schneider v. Sansom*, 62 Tex. 201; 50 Am. Rep. 521; *Crites v. Wilkinson*, 65 Cal. 559.

⁸ *Cameron v. Blackman*, 39 Mich. 108.

⁹ *Grazebrook v. McCreddie*, 9 Wend.

437; *Mills v. Dickson*, 6 Rich. 492; *Sloo v. State Bank*, 1 Scam. 423; *Binnely v. Le Gal*, 19 Barb. 592; *Everson v. Gehrman*, 10 How. Pr. 301; *Bridenbecker v. Mason*, 16 How. Pr. 203; *Rhodes v. Amsinck*, 38 Md. 345; *Grier v. Hood*, 25 Pa. St. 430; *Bitzer v. Shunk*, 1 Watts & S. 340; 37 Am. Dec. 469; *Shedd v. Bank of Brattleboro*, 32 Vt. 709; *Elliott v. Holbrook*, 33 Ala. 659; *Soper v. Fry*, 37 Mich. 236; *Banks's Appeal*, 36 Pa. St. 458; *Barlow v. Reno*, 1 Blackf. 252; *McKee v. Bank*, 7 Ohio, 2d pt., 175; *North v. Mudge*, 13 Iowa, 496; *Christy v. Sherman*, 10 Iowa, 535; *Rhodes v. Amsinck*, 38 Md. 345. A partner cannot bind his copartner by warrant of attorney under seal in the firm name, without authority: *Ellis v. Ellis*, 47 N. J. L. 69.

¹⁰ *Rogers v. Batchelor*, 12 Pet. 231; *McKinney v. Brights*, 16 Pa. St. 399; 55 Am. Dec. 512; *Hagar v. Graves*, 25 Mo. App. 164; *Cannon v. Lindsay*, 85 Ala. 18; 7 Am. St. Rep. 38; *Davies v. Atkinson*, 124 Ill. 474; 7 Am. St. Rep. 373.

tion does not alter the rule.¹ And in any event, if the creditor knows that it is firm property, the burden is on him to show that the other partners assented to the appropriation.² One partner, without the consent, express or implied, of his copartners, cannot apply a claim of the firm to the payment of his individual debt, even to retain the debtor's custom for the firm.³ Where a partnership has so intrusted one partner with the partnership goods that he is enabled to deal with them as apparently his own, and to induce the public to believe them to be his, a sale by him of such goods in payment of his private debt, to one who has no knowledge or notice that they are partnership goods, is valid as against the partnership and its creditors.⁴ Goods furnished a partner individually are not payment of a debt due the partnership, though the partner receiving them agrees that they shall be. Such an agreement does not bind the firm.⁵

A partner has no implied power to authorize an attorney to appear for the other partners;⁶ execute a deed,⁷ unless he had a parol authority, or it is subsequently

¹ *Rogers v. Batchelor*, 12 Pet. 231; *Buck v. Mosley*, 24 Miss. 170; *Ackley v. Staehlin*, 56 Mo. 558; *contra*, *Locke v. Lewis*, 124 Mass. 1.

² *Dob v. Halsey*, 16 Johns. 34; 8 Am. Dec. 293; *Grain v. Cadwell*, 5 Cow. 489; *Eveinghim v. Ensworth*, 7 Wend. 328; *Gansevoort v. Williams*, 14 Wend. 138.

³ *Cotzhausen v. Judd*, 43 Wis. 213; 23 Am. Rep. 539.

⁴ *Locke v. Lewis*, 124 Mass. 1; 26 Am. Rep. 631. As against a general creditor of a solvent partnership, one of the firm, with the consent of his copartners, may in good faith make an absolute transfer of the entire partnership assets in payment of his individual debt: *Schmidlapp v. Currie*, 55 Miss. 597; 30 Am. Rep. 530.

⁵ *Warder v. Newdigate*, 11 B. Mon. 174; 52 Am. Dec. 567.

⁶ *Haslet v. Street*, 2 McCord, 310; 13 Am. Dec. 725; *Hall v. Lanning*, 91

U. S. 160; *contra*, *Parsons on Partnership*, 172, note.

⁷ *Pollock on Partnership*, 37; *Morgan v. Scott*, Minor, 81; *Doe v. Tupper*, 4 Smedes & M. 261; 43 Am. Dec. 483; *Shirley v. Fearn*, 33 Miss. 653; *Lucas v. Bank of Darien*, 2 Stew. 280; *Hart v. Withers*, 1 Penr. & W. 285; *Massey v. Pike*, 20 Ark. 92; *Posey v. Bullitt*, 1 Blackf. 99; *Bentzen v. Zierlein*, 4 Mo. 417; *Henry Co. v. Gates*, 26 Mo. 315; *Trimble v. Coons*, 2 A. K. Marsh. 376; 12 Am. Dec. 411; *Drumright v. Philpot*, 16 Ga. 424; 60 Am. Dec. 738; *Morse v. Billew*, 7 N. H. 556; *Clement v. Brush*, 3 Johns. Cas. 180; *Van Deusen v. Blum*, 18 Pick. 229; 29 Am. Dec. 582; *Morris v. Jones*, 4 Harr. 428; *Cummings v. Cassily*, 5 B. Mon. 74; *Nunnely v. Doherty*, 1 Yerg. 26; *Gerard v. Basse*, 1 Dall. 119; 1 Am. Dec. 227; *Robinson v. Crowder*, 4 McCord, 519; 17 Am. Dec. 763; *Weeks v. Rake Co.*, 58 N. H. 101.

ratified by the copartners;¹ or unless, in the regular course of business, as the execution of a charter party under seal,² or where the instrument was not required to be under seal;³ or give a guaranty in the firm name;⁴ or lend the credit of the firm for the benefit of third parties;⁵ or sign as a surety the name of the partnership.⁶ One partner cannot, in the name of the firm, make an accommodation indorsement.⁷ But one may be authorized by his copartners to make an accommodation indorsement, and this authority may be shown by parol.⁸ Nor can he bind the firm by a promissory note made in the firm name and for his individual debt, the copartners not

¹ *McCart v. Lewis*, 2 B. Mon. 266; *Cady v. Shepherd*, 11 Pick. 400; 22 Am. Dec. 379; *Pike v. Bacon*, 21 Me. 280; *McDonald v. Eggleston*, 26 Vt. 154; 60 Am. Dec. 303; *Smith v. Kerr*, 3 N. Y. 144, 150; *Skinner v. Dayton*, 19 Johns. 513; 10 Am. Dec. 286; *Herbert v. Hanrick*, 16 Ala. 581; *Grady v. Robinson*, 28 Ala. 289; *Gunter v. Williams*, 40 Ala. 561; *Fitchthorn v. Boyer*, 5 Watts, 159; 30 Am. Dec. 300; *Bond v. Aitkin*, 6 Watts & S. 165; 40 Am. Dec. 550; *Drumright v. Philpot*, 16 Ga. 424; 60 Am. Dec. 738; *Wilson v. Hunter*, 14 Wis. 683; 80 Am. Dec. 795; *contra*, *Turbeville v. Ryan*, 1 Humph. 113; 34 Am. Dec. 622.

² *Striffin v. Newell*, 1 T. U. P. Charlt. 163; 4 Am. Dec. 705.

³ *Tapley v. Butterfield*, 1 Met. 515; 35 Am. Dec. 375; *Walsh v. Lennon*, 98 Ill. 27; 38 Am. Rep. 75; *Patten v. Kavanagh*, 11 Daly, 348. But see *Schmertz v. Shreeve*, 62 Pa. St. 457; 1 Am. Rep. 430. A bond given by one member of firm for a partnership debt is binding only on the party executing the bond, and not on the partnership: *McNaughten v. Partridge*, 11 Ohio, 223; 38 Am. Dec. 731.

⁴ *Brettel v. Williams*, 4 Ex. 623; *Fielden v. Lahens*, 2 Abb. App. 111; *Thompson v. Woodward*, 5 W. Va. 216; *First Nat. Bank v. Carpenter*, 34 Iowa, 433; *Selden v. Bank of Commerce*, 3 Minn. 163; *Sutton v. Irwine*, 12 Serg. & R. 13; *Hamil v. Parvis*, 2 Pcnr. & W. 177; *Sweetser v. French*, 2 Cush. 310, 314; 48 Am. Dec. 666; *Osborne v. Stone*, 30

Minn. 25. The authority of a partner to make a guaranty, or to make or indorse notes or bills for the accommodation of others, need not be shown by direct positive proof, but may be inferred from the common course of the business of the firm, or the previous course of dealing between the parties. Ratification by the other partners may also be presumed from their acts or omissions after their knowledge of the act done in the name of the firm: *Sweetser v. French*, 2 Cush. 309; 48 Am. Dec. 666.

⁵ *Lavery v. Burr*, 1 Wend. 529; *Foot v. Sabin*, 19 Johns. 154; 10 Am. Dec. 208; *Shaabert v. Bushong*, 105 Pa. St. 514; *Osborne v. Thompson*, 35 Minn. 229.

⁶ *Rollins v. Stevens*, 31 Me. 454; *Foot v. Sabin*, 29 Johns. 154; 10 Am. Dec. 208; *Lavery v. Burr*, 1 Wend. 529; *Wilson v. Williams*, 14 Wend. 146; *Bank of Vergennes v. Cameron*, 7 Barb. 143; *Whitmore v. Adams*, 17 Iowa, 567; *Butterfield v. Hemsley*, 12 Gray, 226; *Andrews v. Planters' Bank*, 7 Smedes & M. 192; 45 Am. Dec. 300; *Langen v. Hewitt*, 13 Smedes & M. 122; *Wagnon v. Clay*, 1 Mar. (Ky.) 257; *Bank v. Bowen*, 7 Wend. 158; *White v. Davidson*, 8 Md. 169; 63 Am. Dec. 699.

⁷ *Chenowith v. Chamberlain*, 6 B. Mon. 63; 43 Am. Dec. 145; *Heffron v. Hannaford*, 40 Mich. 305; *Langs's Heirs v. Waring*, 17 Ala. 145; *Fielden Lahens*, 2 Abb. App. 111.

⁸ *Butler v. Stocking*, 8 N. Y. 408.

having assented thereto, and the payee not being aware of the consideration on which it is founded.¹ Where the name of the firm appears upon a note as sureties or guarantors, it is the duty of one taking the paper to inquire into the circumstances.² Where a third person finds the note in the hands of the maker, this is notice that the firm indorsement was for the accommodation of the maker.³

So he has no power to make a general assignment of the partnership property for the benefit of creditors;⁴ mortgage the partnership real estate;⁵ refer a case to arbitration.⁶ A farming partnership confers no authority on one partner to carry on in the firm name a store for the sale of merchandise.⁷ Where the object of a partnership is to purchase, improve, and own a certain tract of land, neither partner has any implied power to alienate any

¹ *Davenport v. Runlett*, 3 N. H. 386; *Williams v. Gilchrist*, 11 N. H. 535; *Mauldin v. Branch Bank at Mobile*, 2 Ala. 502; *Pierce v. Pass*, 1 Port. 232; *Knapp v. Norman*, 7 Ala. 19; *L. F. & M. Ins. Co. v. Treat*, 58 Me. 415; *Chazowrnes v. Edwards*, 3 Pick. 5; *Viles v. Bangs*, 36 Wis. 131; *Cotzhausen v. Judd*, 43 Wis. 213; *Lansing v. Gaine*, 2 Johns. 300; *Dob v. Halsey*, 16 Johns. 34; *Saylor v. Mockbie*, 9 Iowa, 209; *Todd v. Lorah*, 75 Pa. St. 155.

² *Wilson v. Williams*, 14 Wend. 146; *Boyd v. Plum*, 7 Wend. 309; *Tanner v. Hall*, 1 Pa. St. 417; *Gansevoort v. Williams*, 14 Wend. 133.

³ *Hendrie v. Berkowitz*, 37 Cal. 113; 99 Am. Dec. 251.

⁴ *Hughes v. Ellison*, 5 Mo. 463; *Dickenson v. Legorie*, 1 Desaus. Eq. 537; *Egberts v. Wood*, 3 Paige, 517; *Pierpont v. Graham*, 4 Wash. 232; *Hook v. Stone*, 34 Mo. 329; *Dana v. Lull*, 17 Vt. 390; *Brooks v. Sullivan*, 32 Wis. 444; *Deming v. Colt*, 3 Sand. 284; *Kimball v. Hamilton Fire Ins. Co.*, 8 Bosw. 495; *Fisher v. Murray*, 1 E. D. Smith, 341; *Hitchcock v. St. John*, 1 Hoff. Ch. 512; *Kelly v. Baker*, 2 Hilt. 531; *Haggerty v. Granger*, 15 How. Fr. 243; *Coope v. Bowles*, 42

Barb. 87; *Holland v. Drake*, 29 Ohio St. 441; *Coakley v. Weil*, 47 Md. 218; *Steinhart v. Fyhrie*, 5 Mont. 463; *Wilcox v. Jackson*, 7 Col. 521.

⁵ *Tapley v. Butterfield*, 1 Met. 515; *Arnold v. Stevenson*, 2 Nev. 234. Nor his interest in specific property of the firm: *Lovejoy v. Bowers*, 11 N. H. 404.

⁶ *Stead v. Salt*, 3 Bing. 101; *St. Martin v. Thrasher*, 40 Vt. 460; *Buchoz v. Grandjean*, 1 Mich. 367; *Harrington v. Higham*, 13 Barb. 660; *Karthauss v. Ferrer*, 1 Pet. 222; *Buchanan v. Curry*, 19 Johns. 137; 10 Am. Dec. 200; *Hatton v. Royle*, 3 Hurl. & N. 500; *Becker v. Boon*, 61 N. Y. 317; *Eastman v. Burleigh*, 2 N. H. 484; *Southard v. Steele*, 3 T. B. Mon. 435; *Fancher v. Bibb Furnace Co.*, 80 Ala. 481; *Walker v. Bean*, 34 Minn. 437; *aliter*, where the submission is not required to be under seal: *Halleck v. Marsh*, 25 Ill. 48; *Gay v. Waltman*, 89 Pa. St. 553; *Southard v. Steele*, 3 T. B. Mon. 436; *Taylor v. Coryell*, 12 Serg. & R. 243. And the other partners may ratify an invalid submission: *Buchanan v. Curry*, 19 Johns. 137; 10 Am. Dec. 200.

⁷ *Humes v. O'Bryan*, 74 Ala. 64.

part of the land.¹ A partner has no power to convey real estate of firm, either by deed or assignment, nor to make contracts written or verbal concerning it, specifically enforceable against his copartners.²

ILLUSTRATIONS.—In a bond given for the purpose of obtaining a dissolution of an attachment of partnership property, both partners were named as principals, but the bond was executed by only one of them in the name of the firm. *Held*, that it could not be enforced against a surety without proof of the assent of the other partner to its execution: *Russell v. Annable*, 109 Mass. 72; 12 Am. Rep. 665. A, the resident member of the firm of A, B, and C, general merchants, purchased a stone storehouse and a lot of stationery in his individual name, giving in payment notes in the firm name. *Held*, that the purchase was within the scope of the partnership business, and the firm was liable: *Davis v. Cook*, 14 Nev. 265. A partner who did not but who might have consulted his copartner by mail or telegraph, without his knowledge or consent, sold the entire property of the firm to one who knew the facts. *Held*, that the absent partner could repudiate the sale: *Hunter v. Waynick*, 67 Iowa, 555. A member of a firm, who had charge of its financial business, took up firm notes by giving in exchange therefor notes of a third person, indorsed by him in the firm name, which indorsement was without the knowledge of his partner. *Held*, that the indorsement was within the authority of the partner making it, and that the firm was liable thereon: *Steuben Co. Bank v. Alberger*, 101 N. Y. 202.

§ 647. **Agreements between Partners Restricting Authority — Not Binding on Third Parties except after Notice.**—Partners may stipulate among themselves that some one of them only shall enter into particular contracts, or that as to certain of their contracts none shall be liable except those by whom they are actually made, or otherwise limit the authority which the law implies to a partner; but with such private arrangements, third persons dealing with the firm without notice have no concern.³ A member of an ordinary trading firm can bind

¹ *Berry v. Folkes*, 60 Miss. 576.

² *Rufner v. McConnel*, 17 Ill. 212; 63 Am. Dec. 362.

³ *Cox v. Hickman*, 8 H. L. Cas. 304; *Barrett v. Russell*, 45 Vt. 43; Ontario

Bank v. Hennessey, 48 N. Y. 545;

Bank of Rochester v. Monteath, 1 Denio, 402; 43 Am. Dec. 682; *Baker*

v. Mann, 5 Bush, 675; *Johnson v. Bernheim*, 76 N. C. 139; *Beck v. Martin*, 2

the firm for a loan of money, despite a secret agreement among the partners to the contrary unknown to the lender.¹ A bill drawn by a partner contrary to the partnership agreement is binding on the firm, as against third persons taking it without notice of the agreement, if drawn in the firm name for a partnership demand.² An agreement to share in the profits and to a certain extent in the losses of a business was held to constitute the parties partners as to third persons, although the business was to be carried on by and in the name of one party, and the agreement was expressed not to be "for any purpose of business, or manufacture, or partnership."³ But the partnership may give notice to the world of such restricted authority, whereupon the firm will not be bound beyond the terms of the agreement as to any person to whose knowledge the notice has come.⁴ One partner is not bound by a contract entered into by his copartner, after giving actual notice to the party proposing to make it that he will not be bound thereby, although the fruits of the contract have been enjoyed by the partnership of which he is a member.⁵

§ 648. Admissions of Partner—When Binding on Firm.—An admission or declaration made by one partner concerning the partnership affairs is relevant against the partnership.⁶ But *aliter*, of course, as to matters out-

McMull. 260; *Winship v. Bank of U. S.*, 5 Pet. 530; *Bank of Kentucky v. Brooking*, 2 Litt. 45; *Miller v. Hughes*, 1 A. K. Marsh. 181; 10 Am. Dec. 719; *Devin v. Harris*, 3 G. Greene, 186; *Kelly v. Scott*, 49 N. Y. 595; *Traders' Bank v. Astor*, 11 Wend. 87; *Smith v. Lusher*, 5 Cow. 689; *Frost v. Hanford*, 1 E. D. Smith, 540; *Edwards v. Tracy*, 62 Pa. St. 374; *Hoskinson v. Eliot*, 62 Pa. St. 393; *Perry v. Randolph*, 6 Smedes & M. 333; *Heirn v. McCaughan*, 32 Miss. 17; *Faler v. Jordan*, 44 Miss. 283; *Sage v. Sherman*, 2 N. Y. 417; *Coons v. Renick*, 11 Tex. 134; 60 Am. Dec. 230.

¹ *Benninger v. Hess*, 41 Ohio St. 64.

² *Bank of Rochester v. Monteath*, 1 Denio, 402; 43 Am. Dec. 682.

³ *Manhattan Brass etc. Co. v. Sears*, 45 N. Y. 797.

⁴ *Pollock on Partnerships*, sec. 43.

⁵ *Monroe v. Conner*, 15 Me. 178; 32 Am. Dec. 148.

⁶ *Pollock on Partnerships*, sec. 45; *Henslee v. Cannefax*, 49 Mo. 295; *Smitha v. Cureton*, 31 Ala. 652; *Jemison v. Minor*, 34 Ala. 33; *Jameson v. Franklin*, 6 How. (Miss.) 376; *Faler v. Jordan*, 44 Miss. 283; *Converse v. Shambaugh*, 4 Neb. 378; *Pierce v. Wood*, 23 N. H. 520; *Webster v.*

side the purposes of the partnership.¹ The answer and admission of one partner upon process of garnishment, where both have been regularly served with process, will bind the other.² But the declarations of a partner as to who compose a firm, though admissible against him, are not against the other partners.³ Entries which, in effect, are admissions of indebtedness on the part of the firm making them, do not bind one who has retired from the firm before they were made, whether the creditor knew of the retirement or not.⁴

§ 649. Representations by Partner—When Binding on Firm.—A representation made by one partner to any person concerning the partnership affairs has the same effect as against the firm, and, so far as concerns the civil rights and liabilities of the partners, as if it had been made by all the partners.⁵ Where a partner contracts a debt, representing to the creditor that it is for the benefit of the firm, the firm is liable, whether such representation is true or false, if the transaction is within the scope of the partnership business.⁶ But the rule does not apply to a representation made by one partner as to the extent of his own authority to bind the firm.⁷

§ 650. Liability of Partnership for Frauds, Torts, and Negligences of Partners.—Where loss or injury is caused to third persons, or penalties incurred, by the wrongful

Stearns, 44 N. H. 498; *Ensminger v. Marvin*, 5 Blackf. 210; *Odiorno v. Maxey*, 15 Mass. 39; *Dutton v. Woodman*, 9 Cush. 255; 57 Am. Dec. 46; *Fickett v. Swift*, 41 Me. 65; 66 Am. Dec. 214; *Simons v. Vulcan Co.*, 61 Pa. St. 202; 100 Am. Dec. 628.

¹ *Heffron v. Hanaford*, 40 Mich. 305; *Union Bank v. Underhill*, 102 N. Y. 336.

² *Anderson v. Wanzer*, 5 How. 587; 37 Am. Dec. 170.

³ *Dixon v. Hood*, 7 Mo. 414; 38 Am. Dec. 461; *Grafton Bank v. Moore*, 13 N. H. 99; 38 Am. Dec. 478; *McCorkle*

v. Doby, 1 Strob. 396; 47 Am. Dec. 560. A letter to one partner admitting the existence of the partnership is not admissible in evidence against another alleged partner: *Porter v. Wilson*, 13 Pa. St. 641.

⁴ *Pringle v. Leverich*, 97 N. Y. 181; 49 Am. Rep. 522.

⁵ *Wickham v. Wickham*, 2 Kay & J. 478; *Griswold v. Haven*, 25 N. Y. 595; 82 Am. Dec. 380.

⁶ *Stockwell v. Dillingham*, 50 Me. 442; 79 Am. Dec. 621.

⁷ *Ex parte Agace*, 2 Cox, 312.

act or negligence of any partner acting in the ordinary course of the business of the firm, the firm is liable therefor to the same extent as the partner so acting.¹ Members of a partnership firm are answerable for a false warranty made by one of such members on a sale of partnership property within the scope of his authority; and they are equally liable for a fraud under the same circumstances.² But one partner is generally not liable for a libel published by another.³ So conversion committed by one partner, of property which has been delivered to him for purposes connected with the business of the partnership, is deemed to be the act of the firm, unless repudiated by the other partners.⁴

ILLUSTRATIONS. — A partnership, consisting of four individuals, engaged in operating a distillery, was sued for fraud and deceit in the sale of some stock and other personal property belonging to the firm in and around the distillery. One of the defendants was anxious to sell his interest to the plaintiff, and had agreed upon the invoice value of the property as the basis for the sale. To induce plaintiff to buy, he falsely represented to plaintiff that the invoice price of the property was in excess of what it really was, and plaintiff gave notes for the amount, relying upon the representations. Plaintiff here tries to hold the partnership liable for the false representations. *Held*, that partners are liable *in solido* for the torts of one, if it were committed by him as a partner, and in the course of the business of the partnership; that defendants were partners in operating the distillery, and any tort committed by one of them in the course of that business would bind the partners. But the selling of the interest of a partner in the property and business of the firm is very different from operating and conducting the firm business, and hence the partnership is not liable: *Schwaabacker v. Riddle*, 84 Ill. 517. A partner on a note signed by the firm by means of a forged indorsement, of which his co-partner was ignorant, obtained money from a bank, which was

¹ 1 Lindley on Partnership, 315; Parsons on Partnership, 150-158; *Champion v. Bostwick*, *post*; *Locke v. Stearns*, 1 Met. 500; 35 Am. Dec. 383; *Heirn v. McCaughan*, 32 Miss. 17; 66 Am. Dec. 589; *Moorehead v. Gilmore*, 77 Pa. St. 118; 18 Am. Rep. 435; *Wolf v. Mills*, 56 Ill. 360.

² *Morehouse v. Northrop*, 33 Conn. 380; 89 Am. Dec. 211.

³ *Woodling v. Knickerbocker*, 31 Minn. 268; *Atlantic Glass Co. v. Paulk*, 83 Ala. 404.

⁴ *Nisbet v. Patton*, 4 Rawle, 120; 26 Am. Dec. 122.

placed to the credit of the firm. Before the maturity of the note, it was discovered that the indorsement was forged. *Held*, that the amount could be recovered immediately in an action which would lie against both partners: *Manufacturers' Bank v. Gore*, 15 Mass. 75; 8 Am. Dec. 83. A horse borrowed by a partner to be used in the firm business was lost through his neglect or other wrong-doing. *Held*, that the owner may recover therefor against the partnership: *Witcher v. Brewer*, 49 Ala. 119.

§ 651. **Misapplication of Moneys.**—Where any money or property of a third person is received by one partner acting within the scope of his ordinary apparent authority in partnership affairs, and is misapplied by that partner, and where any money or property of a third person, being as such in the custody of the firm, is misapplied by any partner, the firm is liable to make good the loss.¹ Funds misappropriated by one partner to the payment of his individual debts may be recovered back if needed for firm purposes, and if paid to a creditor who had knowledge of the misappropriation at the time he received payment, and the misappropriation was without the assent, express or implied, of the other members of the firm. But not unless the partnership is insolvent, and the moneys thus misappropriated are required to discharge its obligations, and the plaintiff, before he can succeed, must prove that the moneys withdrawn by such partner were in excess of the sums which he was entitled to draw from the partnership on his individual account.²

ILLUSTRATIONS.—A, B, and C are partners in a bank, C taking no active part in the business. D, a customer of the bank, deposits securities with the firm for safe custody, and these securities are sold by A and B without D's authority. The value of the securities is a partnership debt, for which the firm is liable to D; and C, or his estate, is liable, whether he knew of the sale or not: *Devaynes v. Noble*, 1 Mer. 572. A and B are solicitors in partnership. C, a client of the firm, hands a sum of money to A, to be invested on a specific security. A never invests it, but applies it to his own use. B receives no part of

¹ Pollock on Partnership, 48.

² *Davis v. Atkinson*, 124 Ill. 474; 7 Am. St. Rep. 373.

the money, and knows nothing of the transaction. B is liable to make good the loss, since receiving money to be invested on specified securities is part of the ordinary business of solicitors: *Blair v. Bromley*, 2 Phill. 354. One branch of the business of a firm was the buying and shipping of hogs. A contracted with one of the partners for the shipment of his hogs on certain conditions. The partner sold the hogs, and absconded with the proceeds. The other members of the firm were cognizant of the agreement between the said partner and A, but had no participation in the fraud practiced by the former. *Held*, that the transaction was fairly within the scope of the partnership business, and the firm must be bound for the fraud of one of their members: *Jackson v. Todd*, 56 Ind. 406. An agent collected money belonging to his principal, and mingled it with the money of a firm of which he was a member, and it was used by the firm. *Held*, that a partnership liability was created, though the other partner was ignorant of the conversion: *Palmer v. Scott*, 68 Ala. 380.

§ 652. Liability of Partners Individually for Wrongs.

—And for wrongs of all kinds for which the firm—as we have seen in the foregoing sections—is liable, each partner is liable jointly with his fellow-partners, and also severally.¹ Every partner is civilly liable for violations of the revenue by his copartners, whether he knew of or consented to such violations or not.² An action for injuries sustained through the negligence of an employee of a firm may be brought against any one or more or all of its members.³ One partner is not liable for a malicious prosecution by his copartner, where he did not know of or consent to it, and it did not benefit the firm.⁴

ILLUSTRATIONS.—One of two partners sold whisky in fraud of the revenue, without the knowledge of the other. *Held*, that the latter could not recover his share of the purchase price: *Curran v. Downs*, 7 Mo. App. 329. One partner of a firm acting as agents for the owner of demised property committed a trespass in expelling the tenant and removing his goods from the premises. *Held*, that the other partner, who took no part

¹ Pollock on Partnership, 47; *Champion v. Bostwick*, 18 Wend. 175; 31 Am. Dec. 376; *Stockton v. Frey*, 4 Gill, 406; 45 Am. Dec. 138; *Heirn v. McCaughan*, *supra*.

² *United States v. Thomasson*, 4 Biss. 99.

³ *Roberts v. Johnson*, 58 N. Y. 613.

⁴ *Rosenkrans v. Barker*, 115 Ill. 331; 56 Am. Rep. 169.

in the act, and knew nothing of it at the time, and neither advised nor directed it, could not be rendered liable on the mere ground of his subsequent approval and sanctioning of the act after its commission: *Grund v. Van Vleck*, 69 Ill. 478. Defendants entered into a written agreement to purchase, lease, and take refusals of lands on their joint account, and to sell, lease, or work the lands so obtained, all losses, expenses, gains, and profits to be divided equally among the parties to the agreement. There was evidence that this agreement had previously been in existence by parol. R., one of the defendants, represented to plaintiffs that the lands were oil-producing, whereas the indications of oil had been produced by petroleum poured on the lands, through the connivance of J., another of the defendants. R. was cognizant of the fraud, but it did not appear that D., another defendant, knew of it. Plaintiffs purchased the lands, and after discovering the fraud brought an action against defendants. *Held*, that the agreement entered into by defendants was a partnership, and was valid even when existing by parol; also that D. was liable with J. and R. for their fraudulent acts and representations in the transaction of the partnership enterprise: *Chester v. Dickerson*, 54 N. Y. 1; 13 Am. Rep. 550.

§ 653. Powers of Majority—To Decide Differences and Disputes.—Where differences arise as to matters in the ordinary course of the partnership business, they are to be decided by a majority of the partners; but the decision must be arrived at in good faith, for the interest of the firm as a whole, and not for the private interest of all or any of the majority, and every partner must have an opportunity to be heard in the matter.¹ The interest of a minority of members of a firm in partnership property does not pass by sale thereof by the majority, if the latter do not act in good faith. The latter's interest alone passes, and the purchaser would become tenant in common with the former.²

§ 654. To Expel Partner.—A majority of the partners cannot expel a partner, unless a power to do so is ex-

¹ Pollock on Partnership, 70; Peacock v. Cummings, 5 Phila. 253; 46 Pa. St. 434.

² Western Stage Co. v. Walker, 2 Iowa, 504; 65 Am. Dec. 789.

pressly conferred on them in the articles of partnership. And even where such power is actually conferred, it must be exercised in good faith, for the benefit of the firm. And the partner must be given a proper opportunity of being heard.¹

§ 655. **Duty of Partners—To Attend to Business Diligently—And Gratuitously.**—Each partner is bound to attend to the partnership business with due diligence,² and is not entitled to remuneration for so doing.³ A partner cannot recover for services rendered the firm, simply on the averment that they were rendered at the special instance and request of the partners.⁴ But, by agreement, one partner may be entitled to extra remuneration for attending to the business,⁵ and it seems that he is entitled to it as of right, where extra work is thrown on him by the willful neglect or inattention to business of another partner.⁶ So in all cases where an agreement to compensate may be fairly implied from the course of dealing between the partners,⁷ or where, from the attendant circumstances, an intention to remunerate the partner rendering the extra service may be inferred,⁸ an express stipulation to that effect is unnecessary.⁹ Each partner must work for the greatest advantage of the firm, and must give full information to his associates regarding the partnership business.¹⁰ The maxim, *Omniam præsumentur contra spoliatores*, was applied to a defendant who, being employed upon a salary to keep the books of

¹ Pollock on Partnership, 73.

² 1 Lindley on Partnership, 794.

³ Pollock on Partnership, 69; *Reybold v. Dodd*, 1 Harr. (Del.) 401; 26 Am. Dec. 401; *Anderson v. Taylor*, 2 Ired. Eq. 420; 38 Am. Dec. 689.

⁴ *McBride v. Stradley*, 103 Ind. 465.

⁵ Pollock on Partnership, 69; *Scudder v. Ames*, 89 Mo. 493; *Gaston v. Kellogg*, 91 Mo. 104. On the clearest proof of intention a partner may claim a salary. And if it is certain that such was the agreement, he may claim it for a

period beyond the lifetime of the co-partner, who has directed, by his will, a continuation of the business: *Godfrey v. Templeton*, 86 Tenn. 161.

⁶ *Airey v. Borham*, 29 Beav. 620.

⁷ *Caldwell v. Leiber*, 7 Paige, 483; *Emerson v. Durand*, 64 Wis. 111; 54 Am. Rep. 593; *Scudder v. Ames*, 89 Mo. 496.

⁸ *Cramer v. Bachmann*, 68 Mo. 310.

⁹ *Bradford v. Kimberly*, 3 Johns. Ch. 431; *Marsh's Appeal*, 69 Pa. St. 30.

¹⁰ Pollock on Partnership, 77.

the firm of which he was a member, kept them in such a manner as to render it impossible to determine correctly the state of the accounts between the partners.¹ One partner may maintain an action against his copartner for damages arising from an injury caused to the business of the firm by the dishonest practices of such copartner.²

ILLUSTRATIONS.—A partner, without negligence, sold property of the firm to the confederate government, from whom he could collect nothing. *Held*, not liable to his copartners: *Peters v. McWilliams*, 78 Va. 567. One entered into a copartnership with his son-in-law, and it was agreed that the father-in-law should furnish a house for a shop, tools, etc., and a house for the defendant to live in, and that he "should be at no expense." *Held*, that these words must be intended to mean expense for things connected with the business, and not family expenses: *Brown v. Haynes*, 6 Jones Eq. 49. In an agreement of copartnership between two, U. and W., "U. bargains and agrees to give the said W. \$450 to manage the business." *Held*, that this salary must be paid out of the copartnership funds: *Weaver v. Upton*, 7 Ired. 458.

§ 656. Duty of Partner—Not to Make Private Gain or Profit.—The rule that an agent must not make an undisclosed profit out of his agency applies to partners, who must account to the partnership for any gains or benefits derived by them from a partnership transaction, or one growing out of the partnership.³ So when contracting between themselves, partners are required to show the utmost good faith toward each other, and the concealment of material facts by one which he should disclose to the other is a fraud for which the contract may be canceled.⁴ If a partner take the property of the firm and trade with it on his own account, he is answerable to his copartners for the profits.⁵ Where by an agreement between copartners the firm is to acquire a

¹ *Dimond v. Henderson*, 47 Wis. 172.

² *Boughner v. Black*, 83 Ky. 521; 4 Am. St. Rep. 174.

³ *Pollock on Partnership*, 77; *Lockwood v. Beckwith*, 6 Mich. 168; 72 Am. Dec. 69; *Simons v. Vulcan Oil Co.*,

61 Pa. St. 202; 100 Am. Dec. 628; *Kilbourn v. Latta*, 5 Mackey, 304; 60 Am. Rep. 373.

⁴ *Caldwell v. Davis*, 10 Col. 481; 3 Am. St. Rep. 599.

⁵ *Coursin's Appeal*, 79 Pa. St. 220.

joint right in any inventions, the partner to whom a patent for such an invention is issued may not claim the exclusive benefits thereof.¹ Partners are entitled to share in profits realized from an adventure of one member of the firm investing a large sum of currency belonging to the firm, but supposed to be worthless, in the purchase and shipping of cotton.² A promise made to one partner upon a consideration belonging to the firm inures to the benefit of the firm.³ One partner cannot claim a lien on the land of his copartner's wife, because of expenditures thereupon of the money of the firm, such money not having been drawn out surreptitiously or in bad faith.⁴ One partner cannot take a new lease in renewal of an existing one of the firm in his own name or for his own benefit without being liable to account for it to the partnership.⁵ The rule is the same as between a surviving partner or surviving partners and the representatives of a deceased partner, until the affairs of the firm have been completely wound up; thus if there are leaseholds belonging to the partnership, and the surviving partner renews the lease before his relations with the representatives of the deceased partner are completely determined, the renewed lease must be treated as partnership property.⁶ One party cannot without the assent of his copartners acquire for himself the exclusive ownership of firm property.⁷

ILLUSTRATIONS.—A and C are partners. C, without the knowledge of A and B, obtains for his sole benefit a renewal of the lease of the house in which the partnership business is carried on. *Held*, that A and B may, at their option, treat the renewed lease as partnership property: *Fetherstonhaugh v. Fenwick*, 17 Ves. 298. A, B, C, and D are partners in the business

¹ *Burr v. De la Vergne*, 102 N. Y. 415.

² *Johnson's Appeal*, 115 Pa. St. 129; 2 Am. St. Rep. 539.

³ *Anderson v. Whitlock*, 2 Bush, 398; 92 Am. Dec. 489.

⁴ *Clements v. Hall*, 2 De Gex & J. 173; *Johnson's Appeal*, 115 Pa. St. 129.

⁵ *Rogers v. Riessner*, 30 Fed. Rep. 525.

⁶ *Crosswell v. Lehman*, 54 Ala. 363; 25 Am. Rep. 684.

⁷ *Sharp v. Hibbins*, 42 N. J. Eq. 543.

of sugar refiners. C is the managing partner, and also does business separately, with the consent of the others, as a sugar dealer. He buys sugar in his separate business, and sells it to the firm, at a profit, at the fair market price of the day, but without letting the other partners know that the sugar is his. *Held*, that the firm is entitled to the profit made on every such sale: *Bentley v. Craven*, 18 Beav. 75. A, B, and C acquire the lease of certain works, for the purposes of a business carried on by them in partnership, A conducting the transaction with the former lessees on behalf of the firm. The former lessees, being anxious to find a responsible assignee and get the works off their hands, pay a premium to A. *Held*, that A must account to his partners for the money thus received: *Fawcett v. Whitehouse*, 1 Russ. & M. 131. Under a partnership agreement A was to manufacture, and B to furnish the capital and sell. *Held*, that B could not charge commissions on his sales, in the absence of an agreement to that effect: *Gilhooley v. Hart*, 8 Daly, 176. One partner occupies with his family premises belonging to the firm. *Held*, that he is chargeable at the dissolution of the partnership with the reasonable rent thereof, although there was no special agreement to that effect: *Holden v. Peace*, 4 Ired. Eq. 223; 45 Am. Dec. 514. Two members of a mining partnership bought out a third partner with their own money. *Held*, that they were under no obligation to permit a fourth partner to share in the profit of the transaction, and that it was immaterial that one of the purchasing partners had had some talk with the fourth partner about making the purchase in behalf of the three, the talk having come to nothing: *Bissell v. Foss*, 114 U. S. 252. The assets of a partnership were sold on dissolution, at public auction, to a person who subsequently conveyed them to one of the partners, in pursuance of a secret arrangement made before the sale. The other partner was also present and bid. *Held*, that the purchasing partner must account to the other therefor, as if no sale had taken place: *Jones v. Dexter*, 130 Mass. 380; 39 Am. Rep. 459. A partnership, formed to continue until a certain date, leased premises for a term to expire at the same date, and made valuable improvements thereon. During the term, one partner, without the knowledge of the others, took a renewal of the lease in his own name for a term to begin at the expiration of the partnership term. *Held*, that the new lease inured to the benefit of the firm, and that the partner was in equity a trustee of the lease for the partnership: *Mitchell v. Reed*, 61 N. Y. 123; 19 Am. Rep. 252.

§ 657. **Nor to Compete with Partnership.**—If a partner, without the knowledge and consent of the other

partners, carries on any business competing or interfering with that of the firm, he must account to the firm for all profits made in such business, and must make compensation to the firm for any loss occasioned thereby.¹ A partner is liable to his copartner for any loss occasioned by his unauthorized formation of a partnership with a third party.² Equity will enjoin one of several partners in a business enterprise, who by the partnership contract has undertaken to superintend and manage the business, from carrying on the same business at the same place, in a separate establishment, for his sole benefit, even though there be no express covenant restraining him from so doing.³

ILLUSTRATIONS.—A partnership was formed for a commission and a warehouse business, the agreement being that one partner should furnish buildings and fixtures, and the other should keep the books, and devote himself, his time, and talents to the business. Buildings were furnished and the business prosecuted until these were fully occupied with cotton stored; and the partner who engaged for the buildings declined to supply any more for an increase of the business. The other partner then put up buildings at his own expense, and received cotton in store in them upon his individual account. He did not, however, at all neglect the partnership stores and business. *Held*, that this was no breach of good faith, nor was his copartner entitled to share in the profits of the individual store: *Par-nell v. Robinson*, 58 Ga. 26.

§ 658. Partnership Articles cannot be Varied Except by Consent—Usage.—The partnership agreement cannot be rescinded or varied except by the consent of all the partners. This assent, however, may be inferred, from acts or course of dealing, as well as expressed.⁴

ILLUSTRATIONS.—It is agreed between partners that no one of them shall draw or accept bills in his own name without the concurrence of the others. Afterwards they habitually permit one of them to draw and accept bills in the name of the firm

¹ Pollock on Partnership, 79.

² *Hellman v. Reis*, 1 Cin. Rep. 30.

³ *Marshall v. Johnson*, 33 Ga. 500.

⁴ Pollock on Partnership, 56; *Mc-Graw v. Pulling*, 1 Freem. (Miss.) 357.

without such concurrence. This course of dealing shows a common consent to vary the terms of the original contract in that respect: *Coust v. Harris*, Turn. & R. 523.

§ 659. What is Partnership Property.—Partnership property consists of all property and valuable interests acquired by purchase or otherwise, or originally brought into the partnership stock, for the purposes and in the course of the partnership business, or on account of the firm.¹ It includes all property bought with money belonging to the firm.²

ILLUSTRATIONS.—One partner in a firm buys railway shares in his own name, and without the authority of the other partners, but with the money and on account of the firm. *Held*, that these shares are partnership property: Pollock on Partnership, 59. The good-will of the business carried on by a firm, so far as it has a salable value, is partnership property: Pollock on Partnership, 59. A and B take a lease of a colliery for the purpose of working it in partnership, and do so work it. *Held*, that the lease is partnership property: Pollock on Partnership, 59. W., a nurseryman, devotes the land on which his business is carried on, and bequeaths the good-will of the business to his three sons as tenants in common in equal shares. After his death the sons continue to carry on the business on the land in partnership. *Held*, that the land so devised to them is partnership property: Pollock on Partnership, 59.

§ 660. What is not Partnership Property.—Where co-owners of an estate or interest in land, not being itself partnership property, are partners as to profits made by the use of such land, and purchase other land out of such profits, to be used in like manner, the land so purchased belongs to them, in the absence of an agreement to the contrary, not as partners, but as co-owners.³

§ 661. Rights of Partners in Partnership Property.—The parties are owners in common of partnership property.⁴

¹ Pollock on Partnership, 58.

² 1 Lindley on Partnership, 663 et seq.

³ Pollock on Partnership, 58; Steward v. Blakeway, L. R. 4 Ch. 603.

⁴ Pollock on Partnership, 57, where it is said: "It is not quite clear whether the interest of partners in the partnership property is more correctly described as a tenancy in com-

§ 662. **Conversion of Partnership Realty into Personality by Law.**—Where land becomes partnership property, it is treated in equity, as between the partners (including the representatives of a deceased partner), and also as between the real and personal representatives of a deceased partner, as personal and not real estate, unless a contrary intention appears either by express agreement or by the conduct of the partners.¹ On the death of a partner, partnership realty goes to the heirs, and is not distributed as personality.² Partnership realty in America, as a general rule, is, in equity, chargeable with the debts of the firm, and with any balance due between the partners on winding up the concern; but the share of a deceased partner in the surplus, after the debts are paid and the equities between the partners are adjusted, is regarded as realty going to the heir rather than to the personal representative.³ Land purchased and held for partnership purposes is partnership property, although not necessary for the purposes of the firm; and judgments against the firm for partnership debts are payable out of its proceeds, in preference to judgments against the partners for individual debts.⁴

mon or a joint tenancy without benefit of survivorship, but the difference appears to be merely verbal."

¹ 1 Lindley on Partnership, 687; *Thompson v. Dixon*, 3 Brown Ch. 200; *Ripley v. Waterworth*, 7 Ves. 435; *Houghton v. Houghton*, 34 Eng. Ch. 491; *Sanborn v. Sanborn*, 11 Grant Ch. 359; *Winslow v. Chiffelle*, Harper Eq. Cas. (S. C. Ct. of App.) 52; *Gordon v. Scott*, 12 Moore P. C. C. 25; *Smith v. Jackson*, 2 Edw. Ch. 34; *Delmonico v. Guilleme*, 2 Sand. Ch. 266; *Smith v. Tarleton*, 2 Barb. Ch. 336; *Boyce v. Coster*, 4 Strob. Eq. 30; *Lyman v. Lyman*, 2 Paine, 22; *Dewey v. Dewey*, 35 Vt. 559; *Roberts v. McCarty*, 9 Ind. 16; 68 Am. Dec. 604; *Arnold v. Wainwright*, 6 Minn. 358; 80 Am. Dec. 448; *Willis v. Freeman*, 35 Vt. 44; 82 Am. Dec. 619; *Ware v. Owens*, 42 Ala. 212; 94 Am. Dec. 642; *A. & W. Sprague Mfg. Co. v. Hoyt*, 29 Fed. Rep. 421. Real property held in the

joint names of a firm as partnership stock is to be regarded at law as held and owned by them as tenants in common, in the absence of any agreement or understanding to the contrary, and is subject to be so treated. But in equity, it should be regarded as held in trust as partnership property, and subject to the rules applicable to partnership personal property, and liable to the claims of the partners upon each other and the debts of the partnership: *Galbraith v. Gedge*, 16 B. Mon. 631; *Divine v. Mitchum*, 4 B. Mon. 488; *Coles v. Coles*, 15 Johns. 159; 8 Am. Dec. 231.

² *Yeatman v. Woods*, 6 Yerg. 20; 27 Am. Dec. 452.

³ *Buchan v. Sumner*, 2 Barb. Ch. 165; 47 Am. Dec. 306; *Summey v. Patton*, Winst. Eq. 52; 86 Am. Dec. 451.

⁴ *Erwin's Appeal*, 39 Pa. St. 535; 80 Am. Dec. 542.

ILLUSTRATIONS.—Real estate is purchased by a firm with partnership money and for use in the partnership business, but is deeded to the partners in their individual names. *Held*, 1. That it belongs to the firm; that the individual partners only hold the title in trust for the firm, and that such trust may be shown by parol testimony; 2. That after the death of a partner, the firm and the partners all being insolvent, the widow of the deceased partner is not entitled to dower therein: *Paige v. Paige*, 71 Iowa, 318; 60 Am. Rep. 799.

§ 663. Conversion of Partnership Property by Agreement.—Partners may at any time, by agreement between themselves, convert partnership property into the several property of any one or more of the partners, or the several property of any partner into partnership property. Such conversion, if made in good faith, is effectual, not only as between the partners, but as against creditors of either the partners or of the firm.¹ The principles and rules of law applicable to partnerships, and which govern and regulate the disposition of the partnership property, do not apply to real estate. One partner can convey no more than his own interest in houses or other real estate, even where they are held for purposes of the partnership.² Upon voluntary dissolution of a partnership, the partners may agree that the partnership property may be the property of one of the members, and if such agreement be *bona fide*, it will be given full effect.³

§ 664. Rights of Partners—Partner's Share—What is It—Extent of.—The share of a partner in the partnership property at any given time is the proportion of the then existing partnership assets to which he would be entitled if the whole were realized and converted into money, and after all the then existing debts and liabilities of the firm had

¹ 1 Lindley on Partnership, 674. In *Cormick's Appeal*, 57 Pa. St. 54, 98 Pennsylvania, it has been held that the intention of the partners to bring realty into partnership property must be manifested by a writing recorded according to law: *Mc-* Am. Dec. 191.

² *Coles v. Coles*, 15 Johns. 159; 8 Am. Dec. 231.

³ *Wilson v. Soper*, 13 B. Mon. 411; 56 Am. Dec. 573.

been discharged.¹ The shares of the partners, in the absence of agreement, are presumed to be equal; and all the partners are entitled to share equally in the profits of the business, and must contribute equally towards the losses, whether of capital or otherwise, sustained by the partnership.²

§ 665. To Take Part in Managing the Business.—Each partner has the right to take part in the management of the partnership business, and one or more of the partners cannot exclude another from an equal share in the management of the concern.³ But it is quite usual for the partners to agree that the management of the partnership affairs shall be confided to one or more of their number, to the exclusion of the others; and such agreements are legal, and may be enforced.⁴

§ 666. To Change Nature of Business.—One or more partners cannot make a change in the nature of the business against the objections of the other. It can only be done with the consent of all.⁵

§ 667. To Transfer his Share or Introduce New Partner.—A new partner cannot be introduced without the consent of all; nor can a partner transfer his interest to another for that purpose.⁶

§ 668. Custody and Inspection of Books of Firm.—The partnership books must be kept at the place of business of the partnership (or the principal place, if there is more than one), and every partner is entitled to have

¹ 1 Lindley on Partnership, 63.

² 1 Lindley on Partnership, 695, 821; *Smith v. Ullman*, 14 Rep. 657; *Peacock v. Peacock*, 16 Sum. Ves. 49; *Stewart v. Forbes*, 1 MacN. & G. 137; *Collins v. Jackson*, 31 Beav. 645; *Munro v. Whitman*, 8 Hun. 553; *Reybold v. Dodd*, 1 Harr. (Del.) 401; 26 Am. Dec. 401; *Pirtle v. Penn*, 3 Dana, 247; 28 Am. Dec. 70; *Farr*

v. Johnson, 25 Ill. 522; *Moore v. Bare*, 11 Iowa, 198; *Roach v. Perry*, 16 Ill. 37; *Stein v. Robertson*, 30 Ala. 286; *Griggs v. Clark*, 23 Cal. 427; *Turnipseed v. Goodwin*, 9 Ala. 372; *State v. Brower*, 93 N. C. 344.

³ Pollock on Partnership, 68.

⁴ 1 Lindley on Partnership, 567.

⁵ 1 Lindley on Partnership, 622.

⁶ *Freeman v. Bloomfield*, 43 Mo. 391.

access to them, or to inspect or transcribe the same, or any of them, when he may think proper.¹

§ 669. Indemnity and Contribution.—Every partner is entitled to be indemnified in account with the firm for payments made and for personal liabilities incurred by him in the ordinary and proper conduct of the business of the firm, or in or about anything necessarily done for the preservation of the business or property of the firm,² or where by the breach of the contract by another partner he is injured.³ When partners contribute to the capital in unequal proportions, interest does not run in favor of either upon his share unless there is something in the partnership articles taking the case out of the ordinary rule.⁴ Where one partner sells his undivided interest, and treats the partnership property as though all equities between himself and his copartner were settled, and appropriates to himself the proceeds as though all partnership debts were paid, he is estopped from setting up claims against the interest of his partner in the firm assets for reimbursements for advances made or firm debts paid.⁵ A partner who neglects and refuses without reasonable cause to perform personal services, which he has stipulated to render the partnership, is liable to account to the firm for the value of the services in the settlement of the partnership accounts.⁶ A partner is entitled to his personal property exemption out of the partnership property before a debt due by him individually to his copartner can be deducted therefrom on a settlement of the partnership.⁷

ILLUSTRATIONS.—One partner contributed money to the common stock, and the other his time and skill, and the whole was

¹ Pollock on Partnership, 72.

² 1 Lindley on Partnership, 779; Pollock on Partnership, 66; Crooker v. Crooker, 52 Me. 287; 83 Am. Dec. 509.

³ Murphy v. Crafts, 13 La. Ann. 519; 71 Am. Dec. 519.

⁴ Osborn v. Green, 5 Mackey, 189.

⁵ Moore v. Steele, 67 Tex. 435.

⁶ Marsh's Appeal, 69 Pa. St. 30; 8 Am. Rep. 206.

⁷ Evans v. Bryan, 95 N. C. 174.

lost. *Held*, that the partner contributing the money could not recover any part of his loss from the other: *Early v. Durborough*, 1 Leg. Gaz. 127. Partners settle their business, and each takes certain firm accounts and agrees to pay certain firm debts assumed by the other. *Held*, that the party paying may recover of the other without proving that he himself has paid all the debts which he assumed, this not being a condition precedent to his right to repayment by the other partners: *Martin v. Good*, 14 Md. 398; 74 Am. Dec. 545. A, B, and C were partners. A having reasons, known to some extent to B, for supposing that C was dishonest, refused longer to continue the copartnership unless B would agree to indemnify him for loss that might thereafter be caused by C. This B did. *Held*, that B was liable on his agreement: *Pardee v. Markle*, 111 Pa. St. 548; 56 Am. Rep. 299. A was town treasurer. It was his practice, known to his partner, B, to deposit the public money with the firm's, and to pay indiscriminately from it their debts and orders drawn on the treasury. The firm dissolved. A was to carry on the business and pay the partnership debts from the assets. He paid, partly out of his individual means and partly from partnership assets, the amount due the township. *Held*, in a suit for an accounting, that B being *particeps criminis*, the law would not enforce contribution, but would leave both where it found them: *Davis v. Gelhaus*, 44 Ohio St. 69.

§ 670. **To Retire from Firm.**—Where a partnership has been entered into for a fixed term, no partner can retire from it during such term except with the consent of all the partners, or in the exercise of an option previously conferred by express agreement.¹ Where no fixed term has been agreed upon for the duration of the partnership, any partner may retire from it at any time, upon giving express notice of his intention so to do to all the other partners.²

§ 671. **Causes Which will Dissolve Partnership—By Act of the Law.**—The partnership (there being no agreement in the articles to the contrary) will be dissolved by act of the law in the following cases: by effluxion of time for which the partnership was entered into;³ by notice

¹ 1 Lindley on Partnership, 757.

² 1 Lindley on Partnership, 232; *Fletcher v. Reed*, 131 Mass. 312.

³ Pollock on Partnership, 82. The

duration of a partnership for a single adventure is limited, by implication, to the time for completing the adventure: *Hubbell v. Buhler*, 43 Hun, 82.

of dissolution (given by any partner where no term is limited for the duration in the articles);¹ by the withdrawal of one partner;² by the alienation by a partner of his share, or by his assigning or encumbering his interest in the property or profits of the firm,—the partnership not being for a fixed term;³ by the death of a partner,⁴ or his lunacy;⁵ by the marriage of a female partner,⁶ and marriage between partners also dissolves the partnership;⁷ by the bankruptcy of a partner, or his interest being taken under an execution;⁸ or by the assignment for the

¹ Pollock on Partnership, 81; Skinner v. Tinker, 34 Barb. 333. The dissolution takes place from the date of the notice: *Id.* A notice once given cannot be withdrawn, except by consent of all the partners: Jones v. Lloyd, 18 Eq. 271.

² Slemmer's Appeal, 58 Pa. St. 168; 98 Am. Dec. 255. Where several enter into a written agreement to form a general partnership, with the understanding that a subsequent agreement should be signed more particularly specifying the terms, the partnership will not be dissolved by the failure of one of the parties to sign the latter paper, unless he so intended, and the others so accepted his refusal: Bush v. Bush, 89 Mo. 360.

³ Pollock on Partnership, 82, 83; Mumford v. McKay, 8 Wend. 442; 24 Am. Dec. 34. For a partner cannot by selling his interest to a third person make the latter a partner against the consent of the other partners: Murray v. Bogert, 14 Johns. 318; 7 Am. Dec. 466. The formation of a corporation by the members of a partnership is not necessarily a dissolution of the partnership: Wausau Bank v. Conway, 67 Wis. 210.

⁴ Pollock on Partnership, 83; Crayshaw v. Maule, 1 Swanst. 251; Canfield v. Hard, 6 Conn. 184; Crawford v. Hamilton, 3 Madd. 251; Washburn v. Goodman, 17 Pick. 519; Dyer v. Clark, 5 Met. 575; Savage v. Putnam, 32 Barb. 425; Bank of Mobile v. Andrews, 2 Sneed, 535; Knowlton v. Reed, 38 Me. 246; Laughlin v. Lorenz, 48 Pa. St. 275; Griswold v. Waddington, 15 Johns. 82; Scholefield v. Eichel-

berger, 7 Pet. 586; Humphries v. McCraw, 5 Ark. 65; Powell v. North, 3 Ind. 392; 56 Am. Dec. 513; Knapp v. McBride, 7 Ala. 19; Remick v. Ewing, 42 Ill. 342; Marlett v. Jackman, 3 Allen, 287; Jenness v. Carleton, 40 Mich. 343. A partner may by will provide for the continuance of the partnership after his decease, and if the survivor assent, the partnership will continue: Vernon v. Vernon, 7 Lans. 493; Davis v. Christian, 15 Gratt. 11; Burwell v. Mandeville, 2 How. 560. And equity may order it to be continued for the benefit of infant heirs: Powell v. North, 3 Ind. 392; 56 Am. Dec. 513. Where partnership articles show a contrary intent, a partnership will not be dissolved by the death of one partner. The jury to determine what was the intent may consider the articles, the kind of business, and the manner of conducting it: McNeish v. Hulless Oat Co., 57 Vt. 316.

⁵ Davis v. Lane, 10 N. H. 161; Isler v. Baker, 6 Humph. 85. In this case, there had been a legal inquest and finding that the partner was insane. It is settled by the weight of authorities that insanity does not dissolve the partnership, but is a ground for equity to act upon: 1 Lindley on Partnership, 224; Parsons on Partnership, 465; Jones v. Noy, 1 Mylne & K. 125; Anonymous, 2 Kay & J. 441; Wrexham v. Hudleston, 1 Swanst. 514, note.

⁶ Pollock on Partnership, 83.

⁷ Bassett v. Shepardson, 52 Mich. 3.

⁸ 1 Lindley on Partnership, 712; Halsey v. Norton, 45 Miss. 703; 7 Am. Rep. 745; Renton v. Chaplain, 9 N. J.

benefit of creditors of the entire firm assets;¹ by the happening of an event which renders it unlawful to carry on the business of the firm by the partners which compose it.² But the absence from the state or absconding of a partner does not work a dissolution.³ The admission of a new member to a firm, or the sale of a partner's interest to an outsider, works a dissolution of the copartnership.⁴ So the positive refusal of a partner further to recognize the partnership as operative, or to do anything more under it, terminates it.⁵ A partner may sue a copartner at law for damages caused by his willfully dissolving the partnership before the expiration of the term fixed by the articles for its continuance. These damages include anticipated profits for the residue of the term fixed by the articles.⁶ So a partner dissolving a partnership with unfair design, and for his own private advantage, is liable to his copartners for the damages suffered thereby.⁷ But in an action brought to recover damages for breach of an agreement to continue a partnership for five years, it was held that the fact that the whole capital provided for by the articles of copartnership had been lost was sufficient ground for the refusal by one of the partners to continue the business.⁸ Where a copartnership is once shown to have existed, the burden of proving a dissolution is on those asserting it.⁹

ILLUSTRATIONS.—A and B charter a ship to go to a foreign port and receive a cargo on their joint adventure. War breaks out between England and the country where the port is situated before the ship arrives at the port, and continues until after the

Eq. 62; *Eustis v. Bolles*, 146 Mass. 413; 4 Am. St. Rep. 327; but not mere insolvency: *Siegel v. Chidsey*, 28 Pa. St. 279; *Arnold v. Brown*, 24 Pick. 89; 35 Am. Dec. 296.

¹ *Wells v. Ellis*, 68 Cal. 243.

² 1 *Lindley on Partnership*, 84. As, for example, the outbreak of war: *Woods v. Wilder*, 43 N. Y. 164; 3 Am. Rep. 684; *Hubbard v. Matthews*, 54 N. Y. 43; 13 Am. Rep. 562; *Taylor v. Hutchison*, 25 Gratt. 536; 18 Am. Rep. 699.

³ I. e., where the "absconding" is not

by statute an act of bankruptcy: *Arnold v. Brown*, 24 Pick. 89; 35 Am. Dec. 296.

⁴ *McCall v. Moss*, 112 Ill. 493.

⁵ *Ligare v. Peacock*, 109 Ill. 94.

⁶ *Bagley v. Smith*, 10 N. Y. 489; 61 Am. Dec. 756; *Slemmer's Appeal*, 58 Pa. St. 168; 93 Am. Dec. 255.

⁷ *Howell v. Harvey*, 5 Ark. 270; 39 Am. Dec. 376.

⁸ *Van Ness v. Fisher*, 5 Lans. 236.

⁹ *Southern White Lead Co. v. Haas*, 73 Iowa, 399.

time appointed for loading. *Held*, that the partnership between A and B is dissolved: *Esposito v. Bowden*, 7 El. & B. 285. A is a partner with ten other persons in a certain business. An act is passed which makes it unlawful for more than ten persons to carry on that business in partnership. *Held*, that the partnership of which A was a member is dissolved: Pollock on Partnership, 84. A, an Englishman, and domiciled in England, is a partner with B, a domiciled foreigner. War breaks out between England and the country of B's domicile. *Held*, that the partnership between A and B is dissolved: *Griswold v. Washington*, 15 Johns. 57; 16 Johns. 438. A two-year lease at a stated rental was made by one partner to another, of his interest in coal mines operated by the firm. *Held*, either to dissolve the partnership absolutely, or with the assent of the members to suspend it during the continuance of the lease: *McAdams v. Hawes*, 9 Bush, 15. One member of a firm gave notice to his copartner that the connection between them was dissolved, but this was not assented to by the copartner, and the parties did not afterwards act upon it. *Held*, that it did not operate a dissolution of the firm: *Sanderson v. Milton Stage Co.*, 18 Vt. 107. The operations of a partnership in the business of supplying beef-cattle to the government, under a contract with one of the firm, were suspended by an injunction issued on the filing of a bill by one member against another, but neither party treated the partnership as legally dissolved. *Held*, that it existed until the filing of the decree of dissolution: *Abrahams v. Meyers*, 40 Md. 499. Defendant and others, desiring to get control of a railroad, entered into an agreement to deal in its stock. Defendant was made manager of the enterprise. The agreement provided that it should continue in force until dissolved by the written agreement of a majority of the parties and subscribers. Finally, a distribution of everything was made among the parties. *Held*, that this wound up the enterprise, so that, for a subsequent purchase made by defendant, he was not required to account to the others: *Kennedy v. Porter*, 109 N. Y. 526.

§ 672. Causes Which will Dissolve Partnership—At Suit of Partner.—At the suit of a partner, the court may dissolve the partnership before the end of the term for which it was formed,¹ for the following causes, viz.: by a

¹ *Sieghortner v. Weissenborn*, 20 N. J. Eq. 172; *Jackson v. Deese*, 35 Ga. 84. In some cases it has been held that equity will declare a partnership void *ab initio*: See *Tattersall v. Groote*, 2 Bos. & P. 135; *Jones v. Yates*, 9

Barn. & C. 532; *Mycok v. Bealson*, L. R. 13 Ch. 384; *Oldaker v. Lavender*, 6 Sim. 239; *Green v. Barrett*, 1 Sim. 45; *Colt v. Wollaston*, 2 P. Wms. 154; *Ex parte Broome*, 1 Rose, 69; *Hamil v. Stokes*, 4 Price, 161; *Fogg v. John-*

partner becoming a lunatic, or permanently incapable of attending to his affairs;¹ or his health or infirmities rendering him unable to do his share of the business;² or being guilty of a breach of partnership duty;³ so where one partner is excluded from the partnership business by the other or others.⁴ The fact that a particular partner's continuance in the firm is injurious to its credit and custom is not of itself ground for a dissolution, where it cannot be imputed to that partner's own willful misconduct. In a case where one partner had been insane for a time, and while insane had attempted suicide, this was held not to be a cause for dissolution, although it was strongly urged that the credit of the firm could not be preserved if he remained in it.⁵ Actual malversation of one partner in the partnership affairs, such as failing to account for sums received,⁶ is ground for a dissolution; so is a state of hostility between the partners, which has become chronic, and renders mutual confidence impossible, as where they have habitually charged one another,⁷ or one partner has habitually charged another,⁸ with gross misconduct in the partnership affairs. And in fine, gross misconduct, want of faith, or lack of diligence which may be productive of permanent injury to the partnership affairs is a good ground for a dissolution,⁹ as by a partner

ston, 27 Ala. 432; 62 Am. Dec. 771. The ground for this relief is generally that the formation of the partnership has been induced by fraud: *Richards v. Todd*, 127 Mass. 167; but see *Gerard v. Gateau*, 84 Ill. 121; 25 Am. Rep. 438.

¹ *Lindley on Partnership*, 235; *Whitwell v. Arthur*, 35 Beav. 140; *Leaf v. Coles*, 1 DeGex, M. & G. 171; *Jones v. Noy*, 2 Mylne & K. 125; *Jones v. Lloyd*, L. R. 18 Eq. 265.

² *Casky v. Casky*, 18 Cent. L. J. 358 (Ky. 1884); *Sayer v. Bennet*, 1 Cox, 107; *Anonymous*, 2 Kay & J. 441; *Leaf v. Coles*, 1 DeGex, M. & G. 174; *Whitwell v. Arthur*, 35 Beav. 140; see *Sadler v. Lee*, 6 Beav. 331.

³ *Master v. Kirton*, 3 Ves. 174; *Smith v. Jeyes*, 4 Beav. 502.

⁴ *Goodman v. Whitcomb*, 1 Jacob & W. 587; *Page v. Van Kirk*, *post*; *Werner v. Lersen*, 31 Wis. 169; *Story v. Moon*, 8 Dana, 331; *Gorman v. Russell*, 14 Cal. 531.

⁵ *Anonymous*, 2 Kay & J. 441, 452.

⁶ *Cheesman v. Price*, 35 Beav. 142; *Smith v. Jeyes*, 4 Beav. 502; *Maber v. Bull*, 44 Ill. 97; *Kennedy v. Kennedy*, 3 Dana, 239; *Essell v. Hayward*, 30 Beav. 158.

⁷ *Baxter v. West*, 1 Drew. & S. 173.

⁸ *Watney v. Wells*, 30 Beav. 56; *Leary v. Shout*, 33 Beav. 582.

⁹ *Page v. Van Kirk*, *post*; *Howell v. Harvey*, *post*; *Ambler v. Whipple*, 20 Wall. 546; *Bishop v. Breckles*, 1 Hoff. Ch. 531; *Dumont v. Ruepprecht*, 33 Ala. 175.

so conducting himself as to make it impossible or impracticable for the other partner or partners to carry on business with him.¹ But a trifling breach of the partnership articles is not ground for a dissolution;² or a mere error of judgment by a partner,³ or small differences, grievances, or misconduct not of permanent injury to the partnership.⁴ So discourtesy to customers, not causing any serious injury, is not a ground for dissolution. Where unfriendly relations are alleged, they must be so serious as to prevent the success of the business, and the complainant must himself be without fault.⁵ So it is a good ground for a dissolution that a partner has become liable to a criminal prosecution;⁶ or where the partnership being for a fixed term, another partner assigns or encumbers his partnership interest;⁷ or where the business of the partnership can be carried on only at a loss;⁸ or the accomplishment of the purposes of the partnership is rendered impracticable;⁹ or that the whole of the firm's capital has been lost;¹⁰ or where there was fraud, misrepresentation, imposition, or oppression in the original agreement;¹¹ or where subsequent causes render the partnership onerous and oppressive;¹² or that one of the partners collected and converted to his own use a large sum of money belonging to the firm.¹³ Though

¹ *Harrison v. Tennant*, 21 Beav. 482; *Atwood v. Maude*, L. R. 3 Ch. 373.

² *Anderson v. Anderson*, 25 Beav. 100.

³ *Cash v. Earnshaw*, 66 Ill. 402.

⁴ *Goodman v. Whitcomb*, 1 Jacob & W. 589; *Gerard v. Gateau*, *ante*; *Cash v. Earnshaw*, 66 Ill. 402; *Howell v. Harvey*, 5 Ark. 270; 39 Am. Dec. 376; *Page v. Van Kirk*, 1 Brewst. 284.

⁵ *Gerard v. Gateau*, 84 Ill. 121; 25 Am. Rep. 438; *Herm v. Walsh*, 2 Edw. Ch. 129; *Lafond v. Deems*, 52 How. Pr. 41.

⁶ *Essell v. Hayward*, 30 Beav. 158.

⁷ *Pollock on Partnerships*, 85.

⁸ *Jennings v. Baddeley*, 3 Kay & J. 78; *Holliday v. Elliott*, 8 Or. 84; *Slemmer's Appeal*, 58 Pa. St. 168; 98 Am.

Dec. 255; *Sieghortner v. Weissenborn*, 20 N. J. Eq. 172.

⁹ *Fogg v. Johnston*, 27 Ala. 432; 62 Am. Dec. 771; *Harrison v. Tennant*, 21 Beav. 482; *Howell v. Harvey*, 5 Ark. 270; 39 Am. Dec. 376; *Brien v. Hamman*, 1 Tenn. Ch. 467; *Baring v. Dix*, 1 Cox, 213.

¹⁰ *Vanness v. Fisher*, 5 Lana. 236; *Jennings v. Baddeley*, 3 Kay & J. 78; *Claiborne v. Creditors*, 18 La. 501.

¹¹ *Fogg v. Johnston*, 27 Ala. 432; 62 Am. Dec. 771; *Howell v. Harvey*, 5 Ark. 270; 39 Am. Dec. 376.

¹² *Howell v. Harvey*, 5 Ark. 270; 39 Am. Dec. 376.

¹³ *Flammerly Green*, 47 N.Y. Super. Ct. 538.

bad character, drunkenness, and dishonesty on the part of one partner may be good grounds for dissolving a partnership on the application of the other, this other not having known at the time of forming the partnership these characteristics of his copartner, yet when before the partnership was formed they were known by the partner not guilty of them to have existed, they do not authorize such partner himself to treat the partnership as ended, and to take to himself all the benefits of the joint labor and joint property.¹ That one partner exaggerated the value of property which he put into the firm as capital is no ground of dissolution.² Where a partnership is formed for the purpose of buying and selling lands, each partner to furnish an equal share of money, if one should refuse to make the necessary advances, it would be good cause for putting an end to the partnership; but as long as the partnership subsists, a larger advance by one partner than it was his duty to make will be compensated by allowing him interest on such excess.³ The court will not decree a dissolution at the suit of the partner who has himself been the cause of the trouble.⁴ But *aliter* when both are in the wrong.⁵ A partnership will not be dissolved by decree of court, when circumstances render a dissolution inconvenient; e. g., when a large operation has been commenced which cannot be arrested without serious loss.⁶ All the partners or their representatives are indispensable parties to a bill filed to procure a dissolution of the copartnership and an account.⁷ But such a bill cannot be sustained in that form, if the evidence shows that the members have been incorporated.⁸ A mere agreement in partnership articles,

¹ Ambler v. Whipple, 20 Wall. 546.

² Gerard v. Gateau, 84 Ill. 121; 25 Am. Rep. 438.

³ Turnipseed v. Goodwin, 9 Ala. 372.

⁴ Harrison v. Tennant, 21 Beav. 493; Fairthorne v. Weston, 3 Hare, 387; Gerard v. Gateau, 84 Ill. 121; 25 Am. Rep. 438.

⁵ Blake v. Dorgan, 1 G. Greene, 537; Ferrero v. Buhlmeyer, 34 How. Pr. 33;

Boyd v. Mynatt, 4 Ala. 79.

⁶ Richards v. Baurman, 65 N. C. 162.

⁷ Gray v. Larrimore, 2 Abb. 542.

⁸ Benninger v. Gall, 1 Cin. Rep. 331.

to submit to arbitration differences arising, will not preclude a partner from bringing a bill for a dissolution.¹ A creditor may attack a proceeding for dissolution of a partnership, at any time before final distribution of the assets, on the ground that it was instituted to hinder, delay, or defraud creditors.² The decree will usually order the dissolution to date from the day of its entry,³ though it may be ordered to take effect from the filing of the bill.⁴ The costs will be ordered paid out of the partnership estate,⁵ unless where one partner has been guilty of misconduct, when they will be charged on him.⁶

§ 673. Partners after Dissolution Still Bound until Notice to Customers—Exceptions.—The rights of customers or creditors are not affected by any dissolution or change in the firm, until the creditors or customers have notice of the fact.⁷ Creditors who extend credit to the firm are not bound to regard public rumors of dissolution if the partners continue to use the partnership name and avail themselves of its credit.⁸ A person who takes a partnership note, knowing that the partnership articles provide for its dissolution in case of the withdrawal of the capital, is put upon inquiry as to whether such dissolution has taken place.⁹ The estate of a partner who dies,¹⁰ or who becomes bankrupt,¹¹ or of a partner who, not having been known to the creditor to be a partner, retires from the firm,¹² is not liable for partnership debts

¹ Page v. Vankirk, 6 Phila. 284.

² Adams v. Woods, 8 Cal. 152; 68 Am. Dec. 313.

³ Dumont v. Ruepprecht, 38 Ala. 175; Besch v. Frolich, 1 Phill. Ch. 172; Sander v. Sander, 2 Coll. C. C. 276; Jones v. Welsh, 1 Kay & J. 765; Abraham v. Myers, 40 Md. 499.

⁴ Mellerah v. Keen, 27 Beav. 236; Kirby v. Carr, 3 Younge & C. 184.

⁵ Jones v. Welch, 1 Kay & J. 765.

⁶ More v. Story, 8 Dana, 226; Taylor v. Caithorne, 2 Dev. Eq. 221.

⁷ 1 Lindley on Partnership, 421;

Bradley v. Camp, Kirby, 77; 1 Am. Dec. 13; Ketcham v. Clark, 6 Johns. 144; 5 Am. Dec. 197; Price v. Towsey, 3 Litt. 423; 14 Am. Dec. 81; Burgan v. Lyell, 2 Mich. 102; 55 Am. Dec. 53; Clement v. Clement, 69 Wis. 599; 2 Am. St. Rep. 760; Block v. Price, 32 Fed. Rep. 562.

⁸ Moline Wagon Co. v. Rummell, 2 McCrary, 307.

⁹ Smith v. Vanderburg, 46 Ill. 34.

¹⁰ 1 Lindley on Partnership, 418.

¹¹ 1 Lindley on Partnership, 419.

¹² 1 Lindley on Partnership, 420.

contracted after the date of the death, bankruptcy, or retirement respectively. A note executed during the continuance of the partnership, but not delivered until after its dissolution, does not bind it.¹ The bankruptcy of a member of a dissolved firm is as effective notice to a creditor of the dissolution of the firm as though the dissolution had been caused by the bankruptcy.²

ILLUSTRATIONS.—A and B, partners in trade, agree to dissolve the partnership, and execute a deed for that purpose, declaring the partnership dissolved as from the 1st of January; but they do not discontinue the business of the firm, or give notice of the dissolution. On the 1st of February A indorses a bill in the partnership name to C, who is not aware of the dissolution. The firm is liable on the bill: *Ex parte Robinson*, 3 D. & Ch. 388. A bill is drawn on a firm in its usual name of the M. Company, and accepted by an unauthorized agent. A was formerly a partner in the firm, but not to the knowledge of B, the holder of the bill, and ceased to be so before the date of the bill. B cannot sue A upon the bill: *Carter v. Whalley*, 1 Barn. & Adol. 11. A is a partner with other persons in a bank. A dies, and the survivors continue the business under the same firm. Afterwards the firm becomes insolvent. A's estate is liable to customers of the bank for the balances due to them at A's death, so far as they still remain due, and for other partnership liabilities incurred before A's death, but not afterwards: *Devaynes v. Noble*, 1 Mer. 529. A partnership to expire in January appointed an attorney to "buy and sell goods, sign notes, and perform all acts concerning the business." *Held*, that one having notice at the beginning of the partnership of the time of ending could not charge the firm with goods sold to the attorney after the expiration. The dissolution was a revocation: *Schlater v. Winpenny*, 75 Pa. St. 321. A engaged in business under a firm name, purchased goods of B under such name, and afterwards sold out to his son, who continued to purchase under the same name from B, who knew nothing of the sale. *Held*, that A was liable for the purchases so made by his son. *Elverson v. Leeds*, 97 Ind. 336; 49 Am. Rep. 458. A man of means who had carried on business with his son, giving the firm its credit, sold his interest therein to this and another son, who continued to use the firm name. Publication of the dissolution of the old and formation of the new firm was duly made. In an action by a creditor who had no actual notice of the

¹ *Woodford v. Dorwin*, 3 Vt. 82; ² *Eustis v. Bolles*, 146 Mass. 413.
21 Am. Dec. 573.

change, and who had trusted the firm by reason of the continuance of the father's in the firm name, *held*, that the father was estopped: *Speer v. Bishop*, 24 Ohio St. 598.

§ 674. **Notice by and to Partners.**—Notice of dissolution is properly made by publication of the fact in a newspaper at the place where the business was carried on,¹ as to persons who have had no previous dealings with the firm.² But as to those who have had previous dealings, actual notice is held necessary.³ In a recent case in the United States supreme court, it was held that to discharge a member of a firm from a claim of one who had no dealing with it prior to its dissolution, but who knew of its existence, and who were its members, it is not necessary that the latter should have received actual notice of the dissolution, or that notice should have been published in a newspaper at the place of business; it is sufficient if the notice of dissolution was so generally communicated to the business men of the vicinity, as to be likely to come to the knowledge of all.⁴ Mere stopping

¹ *Lansing v. Gaine*, 2 Johns. 300; 3 Am. Dec. 422.

² *Graves v. Merry*, 6 Cow. 701; 16 Am. Dec. 471; *Nat. Bank v. Norton*, 1 Hill, 578; *Austin v. Holland*, 69 N. Y. 571; 25 Am. Rep. 246; *Haynes v. Carter*, 12 Heisk. 7; *Lyon v. Johnson*, 28 Conn. 1; *Simonds v. Strong*, 24 Vt. 642; *Speer v. Bishop*, 24 Ohio St. 598; *Southwick v. McGovern*, 28 Iowa, 533; *Gaar v. Huggins*, 12 Bush, 262; *Watkinson v. Bank*, 4 Whart. 482; 34 Am. Dec. 521; *Amidown v. Osgood*, 24 Vt. 278; 58 Am. Dec. 171. A publication of notice of dissolution of copartnership in a newspaper is sufficient notice of such dissolution to one taking the promissory note upon the faith of the firm's subsequent indorsement: *Galliot v. Planter's etc. Bank*, 1 McMull. 209; 36 Am. Dec. 256.

³ *Vernon v. Manhattan Co.*, 22 Wend. 193; *Shurlds v. Tilden*, 2 McLean, 461; *Clapp v. Rogers*, 12 N. Y. 287; *Wardwell v. Haight*, 2 Barb. 553; *Conn v. Fort Henry Co.*, 12 Barb. 54;

Prentiss v. Sinclair, 5 Vt. 149; 26 Am. Dec. 289; *Austin v. Holland*, 69 N. Y. 571; 25 Am. Rep. 246; *Lyons v. Johnson*, 28 Conn. 1; *Treadwell v. Wells*, 4 Cal. 260; *Kennedy v. Bohannon*, 11 B. Mon. 118; *Simonds v. Strong*, 24 Vt. 642; *Mitchum v. Bank*, 9 Dana, 166; *Gaar v. Huggins*, 12 Bush, 259; *Pope v. Risley*, 23 Mo. 185; *Merritt v. Williams*, 17 Kan. 287; *Davis v. Willis*, 47 Tex. 154; *Carmichael v. Greer*, 55 Ga. 116; *Stewart v. Sonneborn*, 49 Ala. 178; *Watkinson v. Bank*, 4 Whart. 482; 34 Am. Dec. 521; *Johnson v. Totten*, 3 Cal. 343; 58 Am. Dec. 412; *Amidown v. Osgood*, 24 Vt. 278; 58 Am. Dec. 171; *Scheffelin v. Stevens*, 1 Winst. 106; 84 Am. Dec. 355. To render a retiring partner liable on transactions occurring after dissolution, because of want of notice thereof, the customer must have been either a regular or a recent customer: *Bloch v. Price*, 24 Mo. App. 14.

⁴ *Lovejoy v. Spafford*, 93 U. S. 430.

a newspaper notice of his connection is not sufficient.¹ Agents, clerks, and salesmen of one with whom a firm has had dealings are not entitled to actual notice of its dissolution.² The mailing of a letter with postage prepaid, containing a notice of dissolution of partnership, properly addressed to the post-office of a creditor, is not conclusive evidence that it was received.³ The presumption that a notice of the dissolution of a copartnership mailed to a certain person was received by him may be overcome by proof that it was not received. If, in fact, it was not received, such person is not bound, and the question is properly left to the jury.⁴ Notice to one partner of a deed or mortgage is notice to all the partners, and will avoid a subsequent conveyance of the same land to the firm.⁵ Notice to one partner of defects in goods sold is notice to all.⁶

ILLUSTRATIONS.—A firm sold their business and dissolved, publishing notice of the dissolution in a newspaper. The business was carried on under the same name. A customer of the old firm sold to the new firm after the change. *Held*, that he could recover against the members of the old firm, if he sold without notice of the dissolution, although at the time of dissolution the firm was not indebted to him, and he did know the names of its members: *Elkinton v. Booth*, 143 Mass. 479. A partnership indorsed the note of third persons to the plaintiff for value. At maturity the note was renewed by the check of third persons, indorsed by the partnership and others. Pending the running of the note the partnership had been dissolved, and notice thereof had been published in the newspapers, but there was no proof that the plaintiff took or read them, and there was no proof of actual notice to him of the dissolution. *Held*, that he could recover against the partnership on the check: *Rose v. Coffield*, 53 Md. 18; 36 Am. Rep. 389. Notice of dissolution of partnership was published in a newspaper, and a copy thereof, with a red line drawn about the notice, was mailed to an actual dealer residing in another place. *Held*, not alone

¹ *Uhl v. Harvey*, 78 Ind. 26.

⁴ *Meyer v. Krohn*, 114 Ill. 574.

² *Richardson v. Snider*, 72 Ind. 425;
37 Am. Rep. 168.

⁵ *Barney v. Currier*, 1 D. Chip. 315;
6 Am. Dec. 739.

³ *Eckerly v. Alcorn*, 62 Miss. 228;
Austin v. Holland, 67 N. Y. 571; 25
Am. Rep. 246.

⁶ *Jeffrey v. Bigelow*, 13 Wend. 518;
28 Am. Dec. 476.

sufficient to charge such dealer with notice: *Haynes v. Carter*, 12 Heisk. 7; 27 Am. Rep. 747. A notice was published in a newspaper, that A "is to have, after the 1st instant, an interest in our establishment," and signed by C. D. & Co. Held, not a declaration that A is a partner: *Vinson v. Beveridge*, 3 McAr. 597; 36 Am. Rep. 113.

§ 675. Continuing Business after Expiration of Term
—Effect of.—Where a partnership entered into for a fixed term is continued after the term has expired, and without any new agreement, the rights and duties of the partners remain the same as they were at the expiration of the term, so far as consistent with the right of any partner to determine the partnership at will.¹ A continuance of the business by the acting partner or partners, without any settlement or liquidation of the partnership affairs, is presumed to be a continuance of the partnership.² A partnership may be prolonged by express or tacit consent beyond the time stated in the articles. In that case, *prima facie*, the articles are still binding.³

ILLUSTRATIONS.—A clause in partnership articles, entered into between A and B for a fixed term, provides that "in case either of the said partners shall depart this life during the said copartnership term," the surviving partner shall purchase his share at a fixed value. A and B continue their business in partnership after the expiration of the term. Held, that this clause is still applicable on the death of either of them: *Essex v. Essex*, 20 Beav. 442. Articles for a partnership for one year contain an arbitration clause, and the partnership is continued beyond the year. The arbitration clause is still binding: *Gillett v. Thornton*, 19 Eq. 599. A and B are partners for seven years, A taking no active part in the business. After the end of the seven years B continues the business, in the name, on the premises, and with the property of the firm, and without coming to an account. The partnership is not dissolved, and A is entitled to participate, on the terms of the original agreement, in the profits thus made by B: *Parsons v. Hayward*, 4 De Gex, F. & J. 474. A partnership having expired by the limitation in the articles, A, one partner, transmitted the articles to B, the other,

¹ 2 Lindley on Partnership, 847.

² *Miffin v. Smith*, 17 Serg. & R.

³ *Parsons v. Hayward*, 4 De Gex, F. 165.
 & J. 474.

with a renewal indorsed thereon, which B agreed to, provided he should be relieved from his difficulties by the arrival of a certain ship. The ship arrived, and B resumed his duties as partner. *Held*, that the partnership was renewed for the original term, although there was no formal renewal: *Dickson v. Bold*, 3 Desaus. 501. ^e

§ 676. Authority of Partners after Dissolution—Winding up.—After the dissolution, the authority of each partner to bind the firm, and the other rights and obligations of the partners, continue, notwithstanding the dissolution, so far as is necessary to settle and liquidate existing demands, and to complete transactions begun but unfinished at the time of the dissolution.¹ Each partner may collect debts, and receipt for them.² And one partner can release a debt, after dissolution, that is due to the firm.³ So he may lawfully assign to a creditor of the firm a demand due to the partnership.⁴ A partner intrusted with the settlement of a dissolved partnership may bind the partnership by borrowing money to meet its accruing liabilities, and by actually applying the money borrowed in discharge of such liabilities.⁵ The absconding of one partner is an implied consent to a general assignment of the firm property, including lands by the remaining partner to pay firm debts.⁶ An order of sale of partnership property, upon a dissolution of the partnership, will be made by a court of chancery, where there is no provision for its disposition in the partnership

¹ Lindley on Partnership, 427; Heartt v. Walsh, 75 Ill. 200; Ruffner v. Hewitt, 7 W. Va. 585; Houser v. Irvine, 3 Watts & S. 345; 38 Am. Dec. 768; Kinsler v. McCants, 4 Rich. 46; 53 Am. Dec. 711; Johnson v. Totten, 3 Cal. 343; 58 Am. Dec. 412; Western Stage Co. v. Walker, 2 Iowa, 504; 65 Am. Dec. 789. A partner collecting the debts after dissolution must account: Sharp v. Hibbins, 42 N. J. Eq. 543.

² Heartt v. Walsh, 75 Ill. 200; Hil-

ton v. Vanderbilt, 82 N. Y. 591; Robbins v. Fuller, 24 N. Y. 570; Gillilan v. Sun Mutual Ins. Co., 41 N. Y. 376.

³ Morse v. Bellows, 7 N. H. 549; Torrey v. Baxter, 13 Vt. 452. See *contra*, Rootes v. Wellford, 4 Munf. 215; 6 Am. Dec. 510.

⁴ Milliken v. Loring, 37 Ma. 408.

⁵ In re Davis, 5 Whart. 530; 34 Am. Dec. 574.

⁶ Sullivan v. Smith, 15 Neb. 476; 48 Am. Rep. 354.

agreement.¹ But no partner can bind the others by entering into any new contract;² or transfer a chose in action belonging to the firm.³ After a dissolution of partnership, one partner cannot give a note in the name of the firm, even for a pre-existing debt.⁴ So, after dissolution, no power to indorse a note in the name of the firm exists in either partner,⁵ except for the purpose of settling up the business of the firm;⁶ nor after dissolution has one partner authority to waive protest of paper indorsed by the firm;⁷ or employ an attorney to defend the other members in a suit brought against the partnership;⁸ or appear in a suit against the partnership.⁹ A liquidating partner has no power to extend time for payment of obligations of the firm, to increase their amounts, or to obligate the firm to persons to whom it was not bound at the dissolution of the partnership.¹⁰ Admissions and declarations made by one partner after dissolution do not bind the others.¹¹ A

¹ *Allen v. Hawley*, 6 Fla. 142; 63 Am. Dec. 198.

² *Bacon v. Hutchings*, 5 Bush, 597; *Easter v. Farmers' National Bank*, 57 Ill. 215; *Helm v. Cantrell*, 59 Ill. 524; *Dunlap v. Limes*, 49 Iowa, 178; *Simmons v. Curtis*, 41 Me. 373; *Perrin v. Keene*, 19 Me. 355; 36 Am. Dec. 759; *Hicks v. Russell*, 72 Ill. 230; *Mauney v. Coit*, 80 N. C. 300; *Sanders v. Ward*, 23 Ark. 242; *White v. Ins. Co.*, 1 Nott & McC. 556; 9 Am. Dec. 726; *Ellicott v. Nichols*, 7 Gill, 85; 48 Am. Dec. 546; *White v. Tudor*, 24 Tex. 639; 76 Am. Dec. 127. Renewal of a note previously given by the same parties is not a continuation of a prior obligation, but is a new, separate, and distinct contract: *Galliot v. Planters' etc. Bank*, 1 McMull. 209; 36 Am. Dec. 256.

³ *Stair v. Richardson*, 108 Ind. 429.

⁴ *Lansing v. Gaine*, 2 Johns. 300; 3 Am. Dec. 422; *Woodworth v. Downer*, 13 Vt. 522; 37 Am. Dec. 611; *Montague v. Reakert*, 6 Bush, 393; *Whitman v. Leonard*, 3 Pick. 177; *Parker v. Cousins*, 2 Gratt. 372; *Burr v. Williams*, 20 Ark. 172; *Palmer v. Dodge*, 4 Ohio St. 21; *Wilson v. Forder*, 20 Ohio St. 89; *Haddock v. Crocheron*, 32

Tex. 276; 5 Am. Rep. 244; *Cuny v. White*, 51 Cal. 530; *Brown v. Broach*, 52 Miss. 536; *Smith v. Sheldon*, 35 Mich. 42; 24 Am. Rep. 529; *Hurst v. Hill*, 8 Md. 399; 63 Am. Dec. 705; *White v. Tudor*, 24 Tex. 639; 76 Am. Dec. 127.

⁵ *Bryant v. Ford*, 19 Minn. 396; *McDaniel v. Wood*, 7 Mo. 543; *Humphries v. Chastain*, 5 Ga. 166; 48 Am. Dec. 247.

⁶ *Chappell v. Allen*, 38 Mo. 213.

⁷ *Mauney v. Coit*, 80 N. C. 300; 30 Am. Rep. 80. *Aliter* as to demand and notice in *Seldner v. Bank*, 66 Md. 488; 59 Am. Rep. 190.

⁸ *Hall v. Lanning*, 91 U. S. 160; *Bowler v. Houston*, 30 Gratt. 266.

⁹ *Hall v. Lanning*, 91 U. S. 160.

¹⁰ *Palmer v. Dodge*, 4 Ohio St. 21; 62 Am. Dec. 271.

¹¹ *Flowers v. Helm*, 29 Mo. 324; *Brady v. Hill*, 1 Mo. 315; 13 Am. Dec. 503; *Beatty v. Amba*, 11 Minn. 331; *Taylor v. Hillyer*, 3 Blackf. 433; 26 Am. Dec. 430; *Chardon v. Oliphant*, 3 Brev. 183; 6 Am. Dec. 572; *Bull v. Morrison*, 1 Pet. 351; *Baker v. Stackpoole*, 9 Cow. 420; 18 Am. Dec. 508; *Barringer v. Sneed*, 3 Stew. 201; 20 Am. Dec. 75; *Hanneton v. Summers*,

promise or acknowledgment of a debt by a partner, after the dissolution, or a part payment by him, does not, according to the weight of authority, take a case out of the statute of limitations as to his copartners.¹

ILLUSTRATIONS. — A stipulation was contained in articles of copartnership, that neither party shall without the other's written consent sell or assign his interest in the copartnership, or in any property thereof. *Held*, to restrict the *jus disponendi* only during the continuance of the copartnership, and not after its dissolution and the appointment by the court of a receiver of the partnership property: *Noonan v. McNab*, 30 Wis. 227; *Noonan v. Orton*, 30 Wis. 282; 31 Wis. 265. A firm contracted a debt and then dissolved. Afterwards, without notice of the dissolution, the creditors accepted the individual drafts of one of the partners for the debt, and extended the time of payment without the knowledge or consent of his retiring partner. *Held*, that he was released from obligation: *Louderback v. Lilly*, 75 Ga. 855.

§ 677. **Rights and Powers of Surviving Partner.** — After the dissolution of a partnership by the death of a partner, the surviving partner or partners must settle up the business, collect the debts due it, pay the debts due from it, and distribute the assets.² A surviving partner has the

12 B. Mon. 11; 54 Am. Dec. 509. *Aliter* when he has been constituted the agent of the firm to wind up the business: *Bridge v. Gray*, 14 Pick. 55; 25 Am. Dec. 358; *Feigler v. Whitaker*, 22 Ohio St. 606; 10 Am. Rep. 778.

¹ *Bell v. Morrison*, 1 Pet. 351, 370; *Newman v. McComas*, 43 Md. 70; *Tate v. Clements*, 16 Fla. 339; *Yandes v. Lefavour*, 2 Blackf. 371; *Kirk v. Hiatt*, 2 Ind. 322; *Exeter Bank v. Sullivan*, 6 N. H. 124; *Speake v. White*, 14 Tex. 369; *Peet v. O'Brien*, 5 Neb. 360; *Whitney v. Reese*, 11 Minn. 138; *Steele v. Jennings*, 1 McMull. 297; *Belote's Ex'rs v. Wynne*, 7 Yerg. 534; *Muse v. Donelson*, 2 Humph. 166; 36 Am. Dec. 309; *Helm v. Cantrell*, 59 Ill. 524; *Van Keuren v. Parmelee*, 2 N. Y. 523; *Shoemaker v. Benedict*, 11 N. Y. 176; *Wilson v. Torbet*, 3 Stew. 296; *Myatt v. Bell*, 41 Ala. 222; *Levy v. Cadet*, 17 Serg. & R. 126; 17 Am. Dec. 650; *Searight v. Craighead*, 1

Penr. & W. 135; *True v. Andrews*, 35 Ma. 183; *Pierce v. Tobey*, 5 Met. 168; *Coulton v. Mill*, 28 Vt. 504; *Ellicott v. Nichols*, 7 Gill, 85; 48 Am. Dec. 546. *Contra*, *Greenleaf v. Quincy*, 12 Me. 11; 28 Am. Dec. 145; *Merritt v. Day*, 38 N. J. L. 32; 20 Am. Rep. 362; *Cady v. Shepherd*, 11 Pick. 400; *Vinal v. Burrill*, 16 Pick. 401; *Sigourney v. Drury*, 14 Pick. 87; *Shepley v. Waterhouse*, 22 Me. 497; *Willis v. Hall*, 2 Dev. & B. 231; 31 Am. Dec. 412; *McIntire v. Oliver*, 2 Hawks, 209; 11 Am. Dec. 761; *Wheelock v. Doolittle*, 18 Vt. 440; *Beardsley v. Hall*, 36 Conn. 270; 4 Am. Rep. 74; *Mix v. Shattuck*, 60 Vt. 421; 28 Am. Rep. 511. In several of these states, the rule as stated in the text is since adopted by statute.

² *Evans v. Evans*, 9 Paige, 180; *Peters v. Davis*, 7 Mass. 257; *Oakman v. Dorchester etc. Co.*, 98 Mass. 58; *Dwinel v. Stone*, 30 Me. 386; *Clark v. Howe*, 23 Me. 561; *Calvert v. Marlow*,

right in equity to dispose of real property belonging to the firm for the payment of the debts, where the firm is insolvent, and the deed will convey the equity of the heir of a deceased partner, who may be compelled to make a conveyance.¹ He may give preference among the partnership creditors under his general authority to wind up the business of the firm.² A surviving partner who has been appointed one of the administrators of the deceased partner cannot maintain a bill for an accounting against his co-administrator, especially when the bill charges fraud against the deceased. His only remedy is to have the letters of administration revoked.³ He may make a valid assignment of the partnership effects for the benefit of its creditors.⁴ It is the duty of surviving partners to give to the administrator of the deceased partner a full statement of the funds and property of the joint concern. They are required to dispose of the property of the concern to the best advantage, and cannot take the property of the firm to themselves at an estimated value, without the assent of the representatives of the deceased partner. If they do, they will have to account for the profits made upon it, at the election of such representatives.⁵ A surviving partner, who has bought all the assets except letters patent, and who uses the patent against the objection of the ad-

18 Ala. 73; *Kinsler v. McCants*, 4 Rich. 46; 53 Am. Dec. 711; *Shields v. Fuller*, 4 Wis. 104; *Alexander v. Coulter*, 2 Serg. & R. 494; *Berry v. Harris*, 22 Md. 31; *Stearn v. Houghton*, 38 Vt. 586; *Roys v. Vilas*, 18 Wis. 170; *People v. White*, 11 Ill. 350; *Jones v. Hardesty*, 10 Gill & J. 404; *Allen v. Hill*, 16 Cal. 117; *Barry v. Briggs*, 22 Mich. 201; *Offutt v. Scott*, 47 Ala. 104; *Betts v. June*, 51 N. Y. 274; *Heath v. Waters*, 40 Mich. 457; *Egberts v. Wood*, 3 Paige, 517; 24 Am. Dec. 236; *Smith v. Walker*, 38 Cal. 386; 99 Am. Dec. 415; *Gleason v. White*, 34 Cal. 258; *Mathison v. Field*, 3 Rob. (La.) 47; *Murray v. Mumford*, 6 Cow. 441; *Brown v. McFarland*, 41 Pa. St. 129; 80 Am. Dec.

598. A provision that "in the event of the death of either of the parties to this act, it is to be optional with the survivor whether said copartnership shall continue or not," does not bind the heirs: *Hart v. Anger*, 38 La. An. 341.

¹ *Andrews v. Brown*, 21 Ala. 437; 56 Am. Dec. 252.

² *Loeschigk v. Hatfield*, 5 Robt. 26; 4 Abb. Pr., N. S., 210; *Bancroft v. Snodgrass*, 2 Coldw. 430.

³ *Smith v. Bryson*, Phill. Eq. 267; 93 Am. Dec. 610.

⁴ *White v. Ins. Co.*, 1 Nott & McC. 556; 9 Am. Dec. 726; *Egberts v. Wood*, 3 Paige, 517; 24 Am. Dec. 236.

⁵ *Ogden v. Astor*, 4 Sand. 311.

ministrator of the estate of the deceased partner, is liable for one half of the profits, less costs and expenses, and a fair allowance for manufacturer's profits; but the administrator is not entitled to interest, except from the date of filing his bill.¹ Where on the death of a partner the business of the firm is closed by the creation of a new firm, composed of the surviving partner and the representatives of the deceased partner, the creditors of the new firm become clothed with those equities of that firm against the estate of the decedent which arose out of the payment by the new firm of the debts of the old firm.² A surviving partner has no right to use machinery upon his own personal account to the detriment of the estate of the deceased partner, and will be enjoined, whether the machinery is regarded as realty or personalty.³ Although one partner is in possession of the books and papers of a firm after its dissolution, he is not thereby made responsible for debts which he neglected to collect.⁴ Although one partner cannot maintain an action at law against his copartner, a surviving partner may well maintain such an action against the administrator of his deceased partner who has wrongfully obtained possession of property belonging to the partnership, as such survivor has the exclusive right to the use of it.⁵ A surviving partner is not entitled to compensation for winding up the partnership business;⁶ but one who in good faith, and under an honest belief that he has a good defense, resists by litigation, but unsuccessfully, the collection of a claim against the partnership estate, will be entitled to contribution for the reasonable expenses of winding up the partnership affairs;⁷ and a surviving partner is entitled to compensation for his skill and ser-

¹ *Freeman v. Freeman*, 142 Mass. 98.

² *Laughlin v. Lorenz*, 48 Pa. St. 275; 86 Am. Dec. 592.

³ *Stanhope v. Suplee*, 2 Brewst. 455.

⁴ *Wilder v. Morris*, 7 Bush, 420.

⁵ *Shields v. Fuller*, 4 Wis. 102; 65 Am. Dec. 293.

⁶ *Beatty v. Wray*, 19 Pa. St. 516; 57 Am. Dec. 677. But see *Phelan v. Hutchinson*, Phill. Eq. 116; 93 Am. Dec. 602.

⁷ *Lee v. Dolan*, 39 N. J. Eq. 193.

vices out of the profits earned by the deceased partner's capital which he continues to use in the business with the consent of a majority of the heirs, in good faith and with due regard to the interests of all concerned.¹

§ 678. Rights of Partners after Dissolution — Application of Partnership Property. — After dissolution, each and every partner has a right to have the partnership property applied to the payment of the debts and liabilities of the firm, and the surplus applied to what may be due them respectively after deducting what they may owe the firm.² The lien which partners have upon the partnership property to enforce its application to the payment of the partnership debts attaches to all their joint property, but relates no further. Partners as such have no other equities in relation to the separate property of each other than separate creditors.³ The lien is limited to advances for partnership purposes, and does not exist for a private debt due by a copartner.⁴ Partners have no lien upon partnership funds for the payment of the partnership liabilities before individual debts, when the scope of the partnership is so extensive, and covers so much of the property of the individual partners, and the relations of the partners towards each other with respect to the firm property are such that the parties by their very articles of compact must have contemplated a community of goods and of all other interests rather than a partnership.⁵ After the dissolution of a partnership between

¹ *Robinson v. Simmons*, 146 Mass. 167; 4 Am. St. Rep. 299.

² 1 *Lindley on Partnership*, 700; *Doner v. Stauffer*, 1 Penr. & W. 198; 21 Am. Dec. 370; *Morrison v. Blodgett*, 8 N. H. 238; 29 Am. Dec. 653; *Dyer v. Clark*, 5 Met. 562; 39 Am. Dec. 697; *Pearson v. Keedy*, 6 B. Mon. 128; 43 Am. Dec. 160; *Sutcliffe v. Dohrman*, 18 Ohio, 181; 51 Am. Dec. 450; *Arnold v. Wainwright*, 6 Minn. 358; 80 Am. Dec. 448; *Donelson v. Posey*, 13 Ala.

752; *Duryea v. Burt*, 28 Cal. 569; *Crocker v. Crocker*, 46 Me. 250. If he is backward, firm creditors may compel him to allow them to use his name for this purpose: *Backus v. Murphy*, 39 Pa. St. 397; 80 Am. Dec. 531.

³ *Mann v. Higgins*, 7 Gill, 265.

⁴ *Moffatt v. Thomson*, 5 Rich. Eq. 155; 57 Am. Dec. 737.

⁵ *Rice v. Barnard*, 20 Vt. 479; 50 Am. Dec. 54.

attorneys, each partner is entitled to share in the fees collected for the unfinished business of the firm.¹ One partner has no lien on a copartner's interest in the partnership property for a debt due to him from the copartner.² Where pursuant to law a partnership is merged in a corporation, the lien of the partners as partners ceases when they become stockholders, and their claims stand afterwards as debts against the corporation.³ Advancements made by one partner to the firm and all other firm debts must be first discharged out of the firm property, whether real or personal, before recourse can be had to the same by the individual creditors of a partner.⁴ The interest in partnership property liable to the satisfaction of the separate debts of each partner is the interest of each in the property as it stands after the partnership accounts have been settled and the demands of the partnership creditors provided for.⁵ The mere failure of one partner to pay his share of the debts or expenses does not forfeit his right to the common property.⁶

§ 679. Return of Portion of Premium Paid on Entering Partnership.—Where one partner has paid a premium to another on entering into a partnership for a fixed term, and the partnership is dissolved before the expiration of such term, otherwise than by the death of a partner, then, subject to any special agreement between the partners, the court may order the premium, or a proportionate part thereof, to be repaid.⁷

¹ *Osment v. McElrath*, 68 Cal. 466; 58 Am. Rep. 17.

² *Evans v. Bryan*, 95 N. C. 174; 59 Am. Rep. 233.

³ *Franklyn v. Sprague*, 121 U.S. 215.

⁴ *Divine v. Mitchum*, 4 B. Mon. 488; 41 Am. Dec. 241.

⁵ *Winston v. Ewing*, 1 Ala. 129; 54 Am. Dec. 768.

⁶ *Kimball v. Gearhart*, 12 Cal. 27.

⁷ *Pollock on Partnership*, 101. The rule is thus stated in an English case (*Atwood v. Maule*, 3 Ch. 369): "The

court will order the repayment of the premium, or such proportionate part thereof as it thinks just, having regard to the terms of partnership contract, and to the length of time during which the partnership has continued; unless the dissolution is, in the judgment of the court, wholly or chiefly due to the misconduct of the partner who paid the premium; or unless the partnership has been dissolved by agreement, and in such agreement no provision has been made for a re-

§ 680. Profits Made after Dissolution—Other Partners Continuing Business.—Where, after the death or retirement of a partner, the other partner or partners continue the business without any settlement of accounts between them, and use his capital, the out-going partner or his estate is entitled, at his option, to such share of the profits made since the dissolution as is the result of his capital, or to the amount of such capital or assets with interest.¹ The division of profits realized after dissolution of a partnership will not be decreed, unless the business is continued with the joint stock and on the joint capital.² Where one partner holds exclusive possession of the partnership property, and refuses to let in the other partner, he will be accountable in a court of equity to such partner or his grantee for one half the rents and profits of the property so withheld.³ Where the executor of a deceased partner carries on the business with the surviving partners, the executor becomes a copartner, and is liable personally for the debts of the company.⁴ But where, by the articles of partnership, an option is given to surviving or continuing partners to purchase the interest of a deceased or out-going partner, and such option is duly exercised, the estate of the deceased partner, or the out-going partner or his estate, as the case may be, is not entitled to any further or other share of profits; but if any partner, assuming to act in exercise of such option as aforesaid, does not in all material respects comply with the terms thereof, he is liable to account for subsequent profits.⁵

turn of any part of the premium. In the absence of special reasons to the contrary, the proportionate part to be returned will be a sum bearing the same proportion to the whole premium as the unexpired part of the partnership term originally contracted for bears to the whole term."

¹ 2 Lindley on Partnership, 1034; Robinson v. Simons, 146 Mass. 167; 4 Am. St. Rep. 299.

² Keybold v. Dodd, 1 Harr. 401; 26 Am. Dec. 401.

³ Adams v. Kable, 6 B. Mon. 384; 44 Am. Dec. 772.

⁴ Alsop v. Mather, 8 Conn. 584; 21 Am. Dec. 704.

⁵ Pollock on Partnership, 111; Vyse v. Foster, L. R. 7 H. L. 329. See Laughlin v. Lorenz, 48 Pa. St. 275; 86 Am. Dec. 592.

§ 681. **Suits between Partners.**—One partner cannot sue his copartner in an action at law, during the continuance of the partnership, concerning matters appertaining to the partnership;¹ nor can a partner who has paid the whole of a firm debt sue his partner for contribution while the partnership accounts remain unsettled.² One partner cannot sue the other for personal services rendered to the firm.³ He cannot maintain an action of tort against another partner for mutilating a note belonging to the firm;⁴ nor an action on the case against his copartners for damages to which he himself would be liable to contribute, for a breach of contract by the partnership;⁵ nor for advances made to the partner by the firm;⁶ nor by assuming all the outstanding debts can he maintain *assumpsit* for any balance which may be due.⁷ But a partner may sue a copartner at law for the excess which he has contributed to the capital stock;⁸ or for a breach

¹ *Kennedy v. McFaddon*, 3 Har. & J. 194; 5 Am. Dec. 434; *McSherry v. Brooks*, 46 Md. 103; *Myrick v. Dame*, 9 Cush. 248; *Treadwell v. Brown*, 41 N. H. 12; *Burns v. Nottingham*, 60 Ill. 531; *Lane v. Tyler*, 49 Me. 252; *Pico v. Cuyas*, 47 Cal. 174; *Lawrence v. Clark*, 9 Dana, 257; *Gibson v. Moore*, 6 N. H. 547; *Judd v. Wilson*, 6 Vt. 185; *Spear v. Newell*, 13 Vt. 288; *Lyon v. Malone*, 4 Port. 497; *Morrow v. Riley*, 15 Ala. 710; *Murdock v. Martin*, 12 Smedes & M. 660; *Page v. Thomson*, 33 Ind. 137; *Briggs v. Dougherty*, 43 Ind. 247; *Murray v. Bogert*, 14 Johns. 318; 7 Am. Dec. 466; *Burley v. Harris*, 8 N. H. 233; 29 Am. Dec. 650; *Farrar v. Pearson*, 57 Me. 568; 8 Am. Rep. 439; *Bruce v. Hastings*, 41 Vt. 380; 98 Am. Dec. 592; *aliter* where the cause of action does not relate to the partnership: *Howard v. France*, 43 N. Y. 593; *Whitehill v. Shickle*, 43 Mo. 537; *Seaman v. Johnson*, 46 Mo. 111; *Wicks v. Lippman*, 13 Nev. 499; *Crater v. Bininger*, 45 N. Y. 545; or does not involve the partnership accounts: *Lane v. Tyler*, 49 Me. 252; *Bonnafe v. Fenner*, 6 Smedes & M. 212; 45 Am. Dec. 278; or where a settlement and

accounting has been had, and one partner has promised to pay over his share to the other: *Crouse v. Prince*, 1 Mill. 416; and note in 12 Am. Dec. 649; *Dana v. Gill*, 5 J. J. Marsh. 242; 20 Am. Dec. 255. Other cases hold that where there has been a settlement, no express promise to pay over is necessary to authorize the action; *Fanning v. Chadwick*, 3 Pick. 420; 15 Am. Dec. 233; *De Jarnette v. McQueen*, 31 Ala. 230; 68 Am. Dec. 164. An action will lie on a decree in chancery for the balance of account between partners: *Thrall v. Waller*, 13 Vt. 231; 37 Am. Dec. 592.

² *Lawrence v. Clark*, 9 Dana, 257; 35 Am. Dec. 133.

³ *Causten v. Burke*, 2 Har. & G. 295; 18 Am. Dec. 297.

⁴ *Covilliard v. Eaton*, 139 Mass. 105.

⁵ *Crow v. Green*, 111 Pa. St. 637.

⁶ *Thompson v. Steamboat Julius D. Morton*, 2 Ohio St. 26; 59 Am. Dec. 659.

⁷ *Williams v. Henshaw*, 12 Pick. 378; 23 Am. Dec. 614.

⁸ *Bumpass v. Webb*, 1 Stew. 19; 18 Am. Dec. 35; *Marshall v. Winslow*, 11 Mo. 58; 25 Am. Dec. 264.

of the partnership agreement.¹ One partner may maintain an action against the other for contribution, where the partnership is terminated by consent before the proceeds are sufficient to reimburse the excess in advances; and this without going into a general settlement of the accounts.² One partner may maintain an action against his copartner for the destruction of plaintiff's individual property used in the business of the partnership.³ So if one partner furnishes to his copartner money to enable the latter to meet his obligations to the firm, an action at law is maintainable to recover back the amount so advanced.⁴ A partner may sue his copartner at law for a contribution, if the partnership property has been disposed of, and the firm has no credits and owes no debts, so that an accounting in equity is not necessary.⁵ An express promise from one partner to another in respect to contributing to the common stock or making advances thereto may be enforced in an action at law; but an implied promise cannot.⁶ A partner in a single adventure or transaction to be performed for a stipulated price has an action of *assumpsit* for his share against the other partner who has received the whole sum due after the work was finished, and it was not necessary to resort to account render.⁷ Equity will entertain a bill sustaining partnership transactions, and showing that an adjustment of complicated accounts is required.⁸ A partner who, without his consent, is excluded by his copartner and a third person from sharing in the profits of a partnership venture, may maintain a suit in equity to recover his share of the profits converted by them to their use.⁹ If a person by false and fraudulent representations as to the extent of his

¹ Vance v. Blair, 18 Ohio, 532; 51 Am. Dec. 467.

² Merriwether v. Hardeman, 51 Tex. 436.

³ Newby v. Harrell, 99 N. C. 149.

⁴ Bates v. Lane, 62 Mich. 132.

⁵ Clarke v. Mills, 36 Kan. 393.

⁶ Townsend v. Goewey, 19 Wend. 424; 32 Am. Dec. 514.

⁷ Hamilton v. Hamilton, 18 Pa. St. 20; 55 Am. Dec. 585.

⁸ Epping v. Aiken, 71 Ga. 682.

⁹ Pearce v. Ham, 113 U. S. 585.

business induces another to enter into partnership with him for a definite period, a court of equity has jurisdiction to order the partnership articles to be canceled, and to restrain the former from using the name of the latter as a partner; and having obtained jurisdiction for that purpose, may administer complete relief in the same suit, by ordering the former to pay the sums advanced or expended by the latter on account of the partnership.¹ A partner cannot have a partial accounting; it must embrace all partnership transactions.²

ILLUSTRATIONS.—Two partners who had deposited a sum of money with another firm to pay a partnership debt made a final settlement with the idea that the debt had been paid; but said firm after converting the money had become insolvent. *Held*, that one of the partners who paid the debt by giving his note with security might maintain an action against the other partner to recover an amount equal to one half the debt: *Clouch v. Moyer*, 23 Kan. 404. B received certain property from C on storage, and sold it, dividing the proceeds with his partners. C sued all the partners within the jurisdiction and recovered a judgment, which B compromised and paid with the consent of his copartners. *Held*, that he could not sue them at law before the settlement of the partnership accounts. *Bishop v. Bishop*, 54 Conn. 232. A bought of B an interest in a copartnership, and gave his note. The interest included the good-will. B, without A's knowledge or privity, practiced frauds on the customers of the firm. These practices were discovered, and the business of the firm was practically ruined. *Held*, a defense to B's action on the note: *Boughner v. Black*, 83 Ky. 521.

§ 682. **Distribution of Assets after Settlement.**—The assets of the firm are to be applied in the following manner and order: 1. In paying the debts and liabilities of the firm to persons who are not partners therein; 2. In paying to each partner ratably what is due from the firm to him for advances as distinguished from capital; 3. In paying to each partner ratably what is due from the firm to him in respect of capital; 4. The ultimate resi-

¹ *Smith v. Everett*, 126 Mass. 304. 31 Am. Dec. 399; *Ward v. Turner*, 7

² *Baird v. Baird*, 1 Dev. & B. 524; *Jones Eq.* 76.

due, if any, is divisible among the partners in the proportion in which profits are divisible under the partnership contract.¹ In taking a partnership account upon the dissolution of the firm, the capital stock should not be taken into account until a balance is struck, and then if there is any fund on hand, each should be allowed to withdraw his capital or a rebating part of it.² Upon the settlement of a partnership where two partners are equal in interest, one half of any balance of loss or profit is the extent of the liability of one to the other, after having first applied the partnership assets to the exoneration of the partnership liabilities; and as to individual transactions, the whole balance is the amount of the indebtedness of one to the other.³

§ 683. Payment of Losses. — Losses are to be paid first out of profits, next out of capital, and lastly, if necessary, by the partners individually.

ILLUSTRATIONS. — Articles of copartnership between A, B, C, and D, for the transaction of a commission business, provided that A and B should contribute the whole capital in unequal proportions; that A should contribute "such time as he may be able to give"; that B, C, and D should each contribute all their time to the business; that each partner should receive one fourth of the net profits; and that A and B should receive interest on the capital contributed by them. The partnership was afterwards dissolved by mutual consent, the business of the firm closed by B, and it resulted in a loss. *Held*, on a bill in equity by B against the other partners, that the capital constituted a debt of the partnership to which all the partners were bound to contribute equally, and that one of them being insolvent, the loss was to be borne equally by the other three: *Whitcomb v. Converse*, 119 Mass. 38; 20 Am. Rep. 311.

§ 684. Rights of Partnership Creditors and Individual Creditors Respectively. — Creditors of a partnership have a right prior to individual creditors to payment out of

¹ Lindley on Partnership 827.

² Chambers *z.* Crook, 42 Ala. 171;

³ Phelan *v.* Hutchinson, Phill. Eq. 94 Am. Dec. 637.
116; 93 Am. Dec. 603.

the firm assets,¹ and individual creditors are entitled to priority of payment out of the partner's individual property as against partnership creditors.² The lien of part-

¹ Bowden v. Schatzell, 1 Bail. Eq. 360; 23 Am. Dec. 170; Peck v. Fisher, 7 Cush. 389; Fall River Whaling Co. v. Borden, 10 Cush. 467; Somerset Potters Works v. Minot, 10 Cush. 593; Catskill Bank v. Hooper, 5 Gray, 583; Devine v. Mitchum, 4 B. Mon. 488; Galbraith v. Gedge, 16 B. Mon. 633; Indiana Pottery Co. v. Bates, 14 Ind. 9; Clagett v. Kilbourne, 1 Black, 346; Richardson v. Packwood, 6 Martin, 510; Moreau v. Suffrans, 3 Sneed, 599; Bancroft v. Snodgrass, 1 Cold. 455; White v. Dougherty, 1 Mart. & Y. 309; 17 Am. Dec. 802; Egberts v. Wood, 3 Paige, 517; 24 Am. Dec. 236; Grosvenor v. Austin, 6 Ohio, 103; 25 Am. Dec. 743; Payne v. Matthews, 6 Paige, 19; 29 Am. Dec. 739; Ladd v. Griswold, 4 Gilm. 25; 46 Am. Dec. 442; Bardswell v. Perry, 19 Vt. 292; 47 Am. Dec. 687; Kirby v. Schoonmaker, 3 Barb. Ch. 46; 49 Am. Dec. 160; Cumming's Appeal, 25 Pa. St. 268; 64 Am. Dec. 695; Miller v. Estill, 5 Ohio St. 508; 67 Am. Dec. 305; Tillinghast v. Champlin, 4 R. I. 173; 67 Am. Dec. 510; Scudder v. Delashmut, 7 Iowa, 39; 71 Am. Dec. 428; Hubbard v. Curtis, 8 Iowa, 1; 74 Am. Dec. 283; Willis v. Freeman, 35 Vt. 44; 82 Am. Dec. 619; Bullock v. Hubbard, 23 Cal. 495; 83 Am. Dec. 130; Crooker v. Crooker, 52 Me. 267; 83 Am. Dec. 509; Hapgood v. Cornwell, 48 Ill. 64; 95 Am. Dec. 516; Manhattan Ins. Co. v. Webster, 59 Pa. St. 227; 98 Am. Dec. 332; Powers v. Large, 69 Wis. 621; 2 Am. St. Rep. 767; Johnson v. Hersey, 70 Me. 74, the court saying: "Judge Story . . . denominates the partners as having a lien upon the property for firm debts, and creditors of the firm as having a *quasi* lien thereon: Story on Partnership, 360. Lord Eldon called the partner's right an equity amounting to something like a lien: Ex parte Williams, 11 Ves. 5. Chief Justice Gibson describes the right thus: 'The principle which enables partners to pledge to each other the joint effects of a fund for the payment of the joint debts has introduced a preference in favor of joint creditors':

Doner v. Slauffer, 1 Pa. 198. Chancellor Kent says: 'Creditors have no lien upon the partnership effects for their debts. Their equity is the equity of the partners operating to the payment of the partnership debts': 3 Kent's Com. 65. It is commonly said in the cases that the preference of the creditors is worked out through the equity of the partners. The lien is waived if all the partners assent to or join in the sale of partnership goods to pay the debt of one partner: Kent's Com. 65. Chancellor Kent has been supposed to favor the theory of a creditor's lien more strongly than some other jurists have; and the New York court, in a comparatively late case (Menagh v. Whitwell, 52 N. Y. 165), say: 'The better opinion is, at this time, in accord with the views of Chancellor Kent, that the partnership debts have in equity an inherent priority of claim to be discharged from the joint property.' The principle seems to amount to this, that the partners hold the lien for themselves and creditors. It is theirs for the benefit of their creditors. They cannot benefit themselves thereby excepting as they confer benefit upon their creditors. . . . The lien or equity of the partners, until waived by the partners, holds the property in a condition where it can be taken by creditors."

² McCulloh v. Dashiell, 1 Har. & J. 96; 18 Am. Dec. 271; Morgan v. His Creditors, 1 La. 527; 20 Am. Dec. 285; Wilder v. Keeler, 3 Paige, 167; 23 Am. Dec. 781; Egberts v. Wood, 3 Paige, 587; 24 Am. Dec. 236; Payne v. Matthews, 6 Paige, 19; 29 Am. Dec. 739; Bailey v. Kennedy, 2 Del. Ch. 12; 29 Am. Dec. 351; Ladd v. Griswold, 4 Gilm. 25; 46 Am. Dec. 442; Kirby v. Schoonmaker, 3 Barb. Ch. 46; 49 Am. Dec. 168; Howe v. Lawrence, 9 Bush, 553; 57 Am. Dec. 68; Level v. Farria, 24 Mo. App. 445; Davis v. Howell, 33 N. J. Eq. 72, the chancellor saying: "The rule is laid down in the text-books that joint debts are entitled to priority of payment out of the joint estate, and separate debts out of separate

nership creditors for the payment of their debts is not upon the partnership, but is derived from one of the partners, who has a lien upon the partnership property for the payment of the partnership debts; and such lien by a partner, being derivative, ceases when he has divested himself of his interest. If the means by which he has

estates: Story's Eq. Jur., sec. 675; Snell's Principles of Equity, 419; Story on Partnership, sec. 376; Kent's Com. 64, 65; Parsons on Partnership, 480. And though the propriety of the rule has been often and persistently questioned on the ground that it is a violation of principle, and devoid of equity, and was originally adopted from considerations of convenience only, and in bankruptcy cases, and not on principles of general equity, yet it is so firmly established that it must be regarded as a fixed rule of equity. Its history is so well known, and has been so often stated, that it is profitless to repeat it. It was declared in 1715, in *Ex parte Crowder*, 2 Vern. 706; it was affirmed by Lord Hardwicke; and though Lord Thurlow refused to follow it, it was restored by Lord Loughborough and followed by Lord Eldon, and it has existed ever since in the English chancery. It has an exception where there is no joint estate and no solvent partner. But where there is any joint estate, the rule is to be applied. That part of the rule which gives the joint creditors a preference upon the joint estate has been repeatedly recognized in this state: *Cammack v. Johnson*, 2 N. J. Eq. 163; *Matlack v. James*, 13 N. J. Eq. 126; *Mittnacht v. Smith*, 17 N. J. Eq. 259; *Scull v. Alter*, 16 N. J. L. 147; *Curtis v. Hollingshead*, 14 N. J. Eq. 402; *Brown v. Bissett*, 21 N. J. Eq. 46; *Linford v. Linford*, 28 N. J. Eq. 113. . . . In Connecticut the rule is not followed, and that part of it which gives the separate creditors a preference upon the separate estate has been repudiated: *Camp v. Grant*, 21 Conn. 41. It has been repudiated also in certain other states: *Bardwell v. Perry*, 19 Vt. 292; *Emanuel E. Bird*, 19 Ala. 586; 54 Am. Dec. 200. But the doctrine is recognized elsewhere, and has been established after thorough discussion and careful consideration.

In *Wilder v. Keeler*, 3 Paige, 167, Chancellor Walworth, after a full discussion of the subject, gives the sanction of his weighty opinion to the rule as a doctrine of equity. He says: 'In the case now under consideration there was, at the death of G. F. Lush, a large joint fund belonging to the partnership, out of which the joint creditors were entitled to a priority of payment, and out of which several of the joint creditors who have come in under this decree have actually secured a portion of their debts. Nothing but an unbending rule of law should, under such circumstances, induce the court to permit them to come in for the residue of their debts, ratably, with the separate creditors. The amount of the fund which will remain after paying the separate creditors, being a fund which could not be reached at law by the joint creditors whose remedy survived against the surviving partner alone, must be considered in the nature of equitable assets, and must be distributed among the joint creditors upon the principle of this court that equality is equity.' The doctrine was recognized in *Morgan v. Skidmore*, 55 Barb. 263. In Pennsylvania, in *Bell v. Newman*, 5 Serg. & R. 78, 91, 92, Gibson (afterwards chief justice), in a dissenting opinion, strongly supports the rule as one founded on the most substantial justice. In *Black's Appeal*, 44 Pa. St. 503, and again in *McCormack's Appeal*, 55 Pa. St. 252, the doctrine is completely recognized and affirmed. In South Carolina, in *Woddrop v. Price*, 3 Desaus. Ch. 203, *Tunno v. Trezevant*, 2 Desaus. Ch. 264, and *Hall v. Hall*, 2 McCord's Ch. 269, the doctrine was held to be a doctrine of equity. In Massachusetts it is established by statute. In *Murrill v. Neill*, 8 How. 414, it is recognized by the supreme court of the United States."

divested himself of this interest is fraudulent, the creditors may be relieved in a court of chancery.¹ Partnership creditors have no equity, strictly speaking, against partnership effects, nor have they a lien on the partnership effects for their debts. All they can do is to prosecute their claims to judgments against the partners, and to procure executions to be issued thereupon, to be levied upon the partnership effects, upon the separate effects of each partner, or upon both.² Where the creditors of a partnership have levied their execution on land belonging to one of the partners, and their title has become absolute by lapse of the time prescribed by statute, a creditor of the individual partner cannot defeat their title by levying his attachment or execution on the same lands.³ Severance of the liability of partners for their joint debts is not produced by an assignment under seal of the firm property to pay the debts, on condition that the creditors will look to the partners individually for their proportion of the balance of the debts remaining unpaid after dividing the property as assigned, unless the creditors accept the condition, and the partners individually covenant to pay their respective shares.⁴ On dissolution of a partnership, an assignment by a retiring partner *bona fide* of all his interest in the stock and effects to the remaining partners vests the same in the latter as his individual property, and it will be distributable accordingly, notwithstanding his subsequent insolvency; and this rule applies as well to limited as to general partnerships.⁵ A judgment against all the members of a partnership as individuals, though not for a firm debt, has priority over a judgment subsequently rendered against the same persons as partners, and for a partnership debt as a lien upon the real property of the

¹ *Wilson v. Soper*, 13 B. Mon. 411; 56 Am. Dec. 573; *Carver Gun etc. Co. v. Bannon*, 85 Tenn. 712; 4 Am. St. Rep. 803.

² *White v. Parish*, 20 Tex. 688; 73 Am. Dec. 204.

³ *Bowker v. Smith*, 48 N. H. 111; 2 Am. Rep. 189.

⁴ *Le Page v. McCrea*, 1 Wend. 164; 19 Am. Dec. 469.

⁵ *Upson v. Arnold*, 19 Ga. 190; 63 Am. Dec. 302.

partnership.¹ The right of a party having a judgment against partners to enforce payment thereof against them is not affected by his having released lands which at one time belonged to them and upon which the judgment was a lien. He has the right to enforce such payment to the same extent and in the same manner as if no such release had been executed.² Where one partner, without the knowledge or consent of his copartner, pays his own note to a private creditor out of the funds of the insolvent firm, such creditor knowing that the money belonged to the firm, the funds so received will be regarded as held by the private creditor in trust for the benefit of the firm, and may be attached in his hands upon a trustee process instituted against the firm by one of the creditors.³ Separate creditors of an individual surviving partner may attach by way of execution a debt due the partnership of which that individual was a member, before a settlement of the partnership and ascertainment of the debtor partner's interest.⁴ Creditors without liens cannot complain that, by consent of all the partners, partnership property has been applied to the payment of the one partner's debts.⁵ One copartner's share in goods of a firm may be attached and sold on execution for his individual debt.⁶ Partners may convey firm property to secure a debt due from an individual member of the firm, as firm creditors and individual creditors stand upon an equality as regards the partnership effects.⁷ The assignment by one partner of his interest in partnership property in trust to pay all his individual and partnership debts is inferior to the implied lien of the copartner on the partnership property which inures to the benefit of the partnership creditors.⁸

¹ *Davis v. R. R. Co.*, 109 N. Y. 47;
⁴ Am. St. Rep. 418.

² *Gegner v. Warfield*, 72 Iowa, 11; 2
Am. St. Rep. 226.

³ *Johnson v. Hersey*, 10 Cent. L. J.
387.

⁴ *Berry v. Harris*, 22 Md. 30; 85 Am.
Dec. 639.

⁵ *Huiskamp v. Moline Wagon Co.*,
121 U. S. 310.

⁶ *Moore v. Pennell*, 52 Me. 162; 83
Am. Dec. 500.

⁷ *Furman v. Fisher*, 4 Coldw. 626;
94 Am. Dec. 210.

⁸ *Bank of Kentucky v. Herndon*, 1
Bush, 359.

A partner may pay a debt of his firm out of his individual property, even at the expense of his individual creditors.¹ A member of an insolvent firm may with the consent of his partner use the assets of such firm to pay premiums on a policy of insurance on his life for the benefit of his wife, to whom he is in good faith indebted, and the partnership creditors cannot set aside the transaction unless they show fraud.² On a judgment against all the members of a firm upon a joint obligation not an indebtedness of the firm, the property of the firm may be levied on and sold, and the purchaser will acquire absolute title as against subsequent creditors of the firm, although it may be insolvent.³ Where the surviving partner of a firm becomes insolvent, and his individual creditors levy attachments on the partnership property, the partnership creditors may come into equity to enforce their right to priority of payment out of the partnership assets.⁴ In case of an execution against one only of several partners, the proper mode is to levy upon and sell such partner's interest in the whole of the partnership effects, and not in specific articles of the partnership property.⁵

A partnership creditor may resort, in equity, to the estate of a deceased partner without first proceeding against the survivors, and whether they are insolvent or not. This is so because, in equity, the partnership debt is a several as well as a joint one. "The doctrine formerly held upon this subject seems to have been that the joint creditors had no claim whatsoever in equity against the estate of the deceased partner, except when the surviving partners were at the time of his death, or subsequently became, insolvent or bankrupt. But that doctrine has been since overturned, and it is now held that in

¹ Gallagher's Appeal, 114 Pa. St. 353; 60 Am. Rep. 350.

² Hanover Nat. Bank v. Klein, 64 Miss. 141; 60 Am. Rep. 47.

³ Saunders v. Reilly, 105 N. Y. 12; 59 Am. Rep. 472.

⁴ Farley v. Moog, 79 Ala. 148; 58 Am. Rep. 585.

⁵ Gerard v. Bates, 124 Ill. 150; 7 Am. St. Rep. 350; Williams v. Lewis, 115 Ind. 45; 7 Am. St. Rep. 403.

equity all partnership debts are to be deemed joint and several, and consequently the joint creditors have in all cases the right to proceed at law against the survivors, and an election also to proceed in equity against the estate of a deceased partner, whether the survivor be insolvent or bankrupt, or not."¹ But at law a suit must be first brought against the survivor.² A discharge in insolvency of one partner does not release the others.³ An agreement of the creditor to discharge one partner, on his giving security for the payment of the debt, does not discharge the others.⁴ A judgment against one partner is a bar to a subsequent suit against both.⁵

ILLUSTRATIONS.—A partner mortgaged his interest in partnership premises to a *bona fide* mortgagee without notice of any existing partnership debts. *Held*, that the mortgagee could hold as against creditors of the partnership: *McDermot v. Lawrence*, 7 Serg. & R. 438; 10 Am. Dec. 468. One partner retired from the firm, selling his interest to the remaining partner, he agree-

¹ Story on Partnership, sec. 362; *Nelson v. Hill*, 5 How. 127; *Lewis v. United States*, 92 U. S. 622; *Bowker v. Smith*, 48 N. H. 111; *Washburn v. Bank of Bellows Falls*, 19 Vt. 278; *Camp v. Grant*, 12 Conn. 41; 54 Am. Dec. 321; *Wisham v. Lippincott*, 9 N. J. Eq. 353; *Travis v. Tartt*, 8 Ala. 577; *Emanuel v. Bird*, 19 Ala. 596; 54 Am. Dec. 200; *McLain v. Carson*, 4 Ark. 164; 37 Am. Dec. 777; *Saunders v. Wilder*, 2 Head, 579; *Filegan v. Laverty*, 3 Fla. 72; *Gant v. Reed*, 24 Tex. 46; 76 Am. Dec. 94; *Weyer v. Thornburgh*, 15 Ind. 124; *Dean v. Phillips*, 17 Ind. 406; *Hardy v. Overman*, 36 Ind. 549; *Freeman v. Stewart*, 41 Miss. 141; *Irby v. Graham*, 4 Miss. 428; *Mason v. Tiffany*, 45 Ill. 392; *Silverman v. Chase*, 90 Ill. 37; *Ladd v. Griswold*, 4 Gilm. (Ill.) 25; 46 Am. Dec. 443; *Doggett v. Dill*, 108 Ill. 560; 48 Am. Rep. 565; *contra*, *Caldwell v. Stileman*, 1 Rawle, 212; *Bennett v. Woolford*, 15 Ga. 213; *Daniel v. Townsend*, 21 Ga. 155; *Sherman v. Kreul*, 42 Wis. 33; *Reinsdyke v. Kane*, 1 Gall. 385; *Pendleton v. Phelps*, 4 Day, 481; *Hubble v. Perrin*, 3 Ohio, 287; *Jenkins v. De Groot*, 1

Caines Cas. 122; *Hammersley v. Lambert*, 1 Johns. Ch. 508.

² *Barney v. Smith*, 4 Har. & J. 485; *Murray v. Mumford*, 6 Cow. 441; *Clark v. Howe*, 23 Me. 560; *Peters v. Davis*, 7 Mass. 257; *Belton v. Fisher*, 44 Ill. 33; *Josylin v. Taylor*, 24 N. H. 268; *Burgwin v. Hostler*, Tayl. 124; 1 Am. Dec. 582; *Emanuel v. Bird*, 19 Ala. 596; 54 Am. Dec. 200.

³ *Russell v. Rogers*, 9 Mart. (La.) 588; 13 Am. Dec. 326.

⁴ *Roberts v. Strang*, 38 Ala. 566; 82 Am. Dec. 729. A promise by a creditor of a firm to release one partner and look to the other for payment of his claim, where the released partner is not shown to have acted upon the faith of the promise or to have released any security, is without consideration, and does not release the latter from liability: *Fagg v. Hambel*, 21 Iowa, 140; 89 Am. Dec. 561.

⁵ *Smith v. Black*, 9 Serg. & R. 142; 11 Am. Dec. 687; *Anderton v. Levan*, 1 Watts & S. 234; *Moale v. Hollins*, 11 Gill & J. 11; *contra*, *Watson v. Owens*, 1 Rich. 111; *Union Bank v. Hodges*, 11 Rich. 480.

ing to pay the firm debts, and having sufficient property to do so. That property having been wasted, a firm creditor, being unable to enforce his claim, filed a bill to reach property which the out-going partner had withdrawn from the firm when he retired. *Held*, that he had no equitable lien thereon: *Hollis v. Staley*, 3 Baxt. 167; 27 Am. Rep. 759. Two attorneys, who were partners, purchased with partnership funds a tract of land to secure a fee due the firm. *Held*, that a creditor of one of the firm could not subject his debtor's interest until the partnership debts were paid: *Flanagan v. Shuck*, 82 Ky. 617. A firm was dissolved by the death of a partner. The surviving partner was insolvent. His individual creditors levied on the partnership property. *Held*, that equity would enforce the rights of the partnership creditors: *Farley v. Moog*, 79 Ala. 148. B. & L. are partners, and B. & L., as a partnership, are also a member of two other firms, B., L., S., & D., and B., L., & S. *Held*, that the creditors of B. & L. are entitled to a preference in the payment of their debts over the creditors of B., L., S., & D., and B., L., & S., out of the money which is the proceeds of the property of B. & L., and this in the order of the priority of their several attachment liens: *Bullock v. Hubbard*, 23 Cal. 495; 83 Am. Dec. 130.

§ 685. The Good-will of the Business—Rights of Partners as to.—The good-will of a business is defined as the benefit which arises from its having been carried on for some time in a particular house, or by a particular person or firm, or from the use of a particular trade-mark or trade name. Its value consists in the probability that the old customers will continue to be customers, notwithstanding a change in the firm or place of business. It is a species of personal property.¹ The good-will of a tavern or inn is local, and does not exist independently of the house in which it is kept.² On the dissolution of a part-

¹ *Churton v. Douglass*, Johns. 174; *Cruttwell v. Lye*, 17 Ves. 335; *Bell v. Ellis*, 33 Cal. 620; *Smith v. Gibbs*, 44 N. H. 335; *Howe v. Searing*, 6 Bosw. 354; *Glen Manfg. Co. v. Hall*, 61 N. Y. 226; *Fenn v. Bolles*, 7 Abb. Pr. 202; *Cruess v. Fessler*, 39 Cal. 336; *Angier v. Webber*, 14 Allen, 211; 92 Am. Dec. 748.

² *Elliot's Appeal*, 60 Pa. St. 161; and see *Musselman's Appeal*, 62 Pa.

St. 81; 1 Am. Rep. 382. The good-will of a business is property that may be mortgaged or sold in connection with the business; but it cannot be sold by judicial decree or otherwise, unless it be in connection with a sale of the business on which it depends, and of which it is a mere incident: *Metropolitan National Bank v. St. Louis Dispatch Co.*, 36 Fed. Rep. 722.

nership every partner has a right, in the absence of any agreement to the contrary, to have the good-will of the business sold for the common benefit of all the partners.¹ The purchaser of the partnership property does not thereby acquire the good-will.² But the good-will does not survive to the remaining partners on the death of one, to the exclusion of the interest of the deceased or even of a retiring partner.³ A partner who is appointed by a firm to settle up the business of the firm after dissolution, and who continues the business of the firm upon his own account, is not liable to account to the firm for the value of the good-will thereof.⁴ Upon the dissolution of a partnership carrying on the business of an insurance agency in a firm name composed of the names of the partners, there is nothing left to which the good-will as a property right of the business can attach, as neither partner has the exclusive right to carry on the old business, but in the absence of stipulation each is left free to procure for himself alone the agency of the companies formerly represented by the firm.⁵

§ 686. Good-will—Rights of Purchaser of.—The purchaser of a good-will of a business has the right to carry on the same business under the old name (with such addition or qualification, if any, as may be necessary for the protection of the vendor from liability or exposure to litigation under the doctrine of "holding out"), and to represent himself to former customers as the successor to that business.⁶ The purchaser of the good-will of a

¹ 2 Lindley on Partnership, 885. A partnership trade-mark is an asset of the firm, which can be sold on its dissolution. But if not disposed of, each partner has a right to use it, if he continues in the business, unless it has been otherwise agreed: *Smith v. Walker*, 57 Mich. 456.

² *Reeves v. Denicke*, 12 Abb. Pr., N. S., 92.

³ *McGowan v. McGowan*, 22 Ohio St.

370; *Smith v. Everett*, 27 Beav. 446; *Wedderburn v. Wedderburn*, 22 Beav. 84; *Dougherty v. Van Nostrand*, 1 Hoff. Ch. 68; *Holden v. McMahon*, 1 Pars. Sel. Eq. Cas. 270.

⁴ *In re Gyger*, 62 Pa. St. 73; 1 Am. Rep. 382.

⁵ *Rice v. Angell*, Tex., 1889.

⁶ 2 Lindley on Partnership, 879; *Cottrell v. Babcock et al.*, 54 Conn. 122.

business has the right to rely on the representations of the seller concerning its value.¹

ILLUSTRATIONS. — A purchaser from the assignee of the goodwill, trade-marks, etc., of an established business sold the same to a corporation. *Held*, that the corporation had no right to assume the firm name, and could only hold itself out as the successors of the firm: *Hegeman & Co. v. Hegeman*, 8 Daly, 1.

§ 687. Duties of Vendor of. — Unless there is an express agreement to the contrary, the vendor remains free to compete with the purchaser in the same line of business;² and he may publish to the world, by advertisements or otherwise, the fact that he carries on such business. But he may not specially solicit the customers of the old firm to transfer their custom to him;³ and he must not use the name of the old firm so as to represent that he is continuing, not merely a similar business, but the same business.⁴

ILLUSTRATIONS. — A, B, and C have carried on business in partnership, under the firm of A & Co. A retires from the firm, on the terms of the other partners purchasing from him his interest in the business and goodwill, and D is taken in as a new partner. B, C, and D continue the business, under the firm of "B, C, & D, late A & Co." A may set up a similar business of his own next door to them, but not under the firm of A & Co.: *Churton v. Dayton*, John. 174. A sale was made of the goodwill of a business, and an agreement not to carry on the business in the old name in a particular city, but reserving the right to carry on business in any other than the old name. *Held*, that the seller was liable for using the old name, and offering special inducements to customers as being the successor of the old firm: *Burckhardt v. Burckhardt*, 42 Ohio St. 474. On the dissolution of the firm of M. & S., S. bought M.'s interest in certain of the firm property and assumed the rent of the old stand, where he

¹ *Byrne v. Stewart*, Pa., 1889.

² *Labouchere v. Dawson*, L. R. 13

³ *Churton v. Douglas*, John. 174;
Rupp v. Over, 3 Brewst. 133; *Cottrell v. Babcock etc. Co.*, 54 Conn. 122.

Eq. 322.

⁴ *Churton v. Douglas*, John. 174;
Hall's Appeal, 60 Pa. St. 458; *Cottrell v. Babcock etc. Co.*, 54 Conn. 122.

continued the business, while M. opened an office for the same business in another part of the city, as it was understood he was to do. M. removed his name from the old firm sign, but S. replaced it, placing over "S., successor to," in small and almost imperceptible letters. *Held*, that S. should be restrained from such use of M.'s name: *Morgan v. Schuyler*, 79 N. Y. 490; 35 Am. Rep. 543.

CHAPTER XXXVII.

LIMITED PARTNERSHIPS.

- § 688. Limited partnerships — Statutes regulating.
- § 689. Mode of forming.
- § 690. Powers and liabilities of general partners.
- § 691. Powers and liabilities of special partners.
- § 692. Dissolution of.

§ 688. Limited Partnerships—Statutes Regulating.—A limited partnership is one in which one at least of the partners is a partner in the ordinary sense as to rights and liabilities, while at least one other person invests in the business and is liable to the extent of his investment, and no further. The partners whose liability is unrestricted are called general partners, and those with limited liability are called special or limited partners. These partnerships are of statutory origin. The statutes prescribe for what kinds of business they may be formed, and for what they may not be. Any kind of commercial, manufacturing, or commercial or mechanical business is allowed by the statutes of most of the states. But by the laws of more than one half of the states, limited partnerships may not be formed for carrying on either a banking or an insurance business, nor in Missouri, Kentucky, Virginia, and West Virginia for the brokerage business.¹

§ 689. Mode of Forming.—The statutes likewise prescribe the method of forming such partnerships. The persons desiring to form such firm must sign a certificate containing the name of the firm, the nature of the business to be conducted, the place where it is to be carried on, the names of the partners, stating which are general and which special ones, and the amount of capital which each

¹ Stimson's American Statute Law, sec. 5340.

has contributed. Such certificate must be acknowledged as deeds are, and recorded in the county or town where the business is to be carried on, and published in a newspaper for a certain time. In many states the certificate must be accompanied by an affidavit as to the truth of what it contains. Renewals of the partnership beyond the original term must be certified, recorded, and published in the same manner.¹ To bring the special partner within the provision of the statute of New York, making all liable as general partners in case of any false statement in the affidavit required to be made and filed, it is not necessary that the statement be intentionally false. The object of the statute is to give reasonable security to those likely to deal with the copartnership, and this is thwarted by an unintentional as well as by an intentional untruth.² In forming a limited partnership under the Pennsylvania statute, the object of which is information to creditors, strict compliance with its essential requirements is necessary, as well on a renewal as on the original formation, and the affidavit of a general partner on a renewal that a sum, specified and stated to have been paid by a special partner in former articles of copartnership, has been so contributed and remains in the common stock, without stating in what condition it thus remains, is insufficient.³ A certificate of the formation of a limited partnership was executed by one only of the general partners, before the special capital was paid in, and two days afterwards the cash was paid; the certificate was executed by the other general partners and the special partner, and the affidavit required by the statute was filed. This was held a sufficient compliance with the statute.⁴ A check is not an "actual cash payment" under the New York law.⁵ These formal-

¹ Stimson's Statute Law, sec. 5340.

⁴ *Manhattan Co. v. Colgate*, 13 Daly,

² *Van Ingen v. Whitman*, 62 N. Y. 544.

⁵ *Hennessey v. Farrelly*, 13 Daly,

³ *Haddock v. Grinnell Mfg. Co.*, 109 Pa. St. 379.

ties are intended for the protection of the public, and therefore the requirements of the statute on this subject must be strictly complied with.¹ Any failure in this respect will render the special partner liable generally for all the firm's undertakings.² Although the party may have intended to become a special partner only, yet if the mandatory requirements of the statute regulating limited partnerships have not been complied with, he is not entitled to the rights and immunities of a special partner, but is to be regarded and treated as a general partner for all intents and purposes; and the goods contributed by him to the common stock are subject to all the liabilities and incidents of property belonging to a general partnership.³ Persons dealing with a limited partnership are bound by the limitations which the statute imposes.⁴

§ 690. Powers and Liabilities of General Partners.—General partners are by most of the statutes liable to account to each other and to special partners as in the case of ordinary partnerships. A general partner cannot without any consideration assume the debt created by the special partner in procuring the money paid into the firm as his special contribution.⁵

§ 691. Powers and Liabilities of Special Partners.—In most states the special partners have no power to transact business for the partnership, nor to bind it, nor to act as agent or attorney for it. But a special partner may from time to time examine into the concern and advise as to its management.⁶ Special partners are not

¹ *Holliday v. Union Bag Co.*, 3 Col. 342; *Durant v. Abendroth*, 9 Jones & S. 53; 69 N. Y. 148; *Richardson v. Hogg*, 38 Pa. St. 153; *Andrews v. Schott*, 10 Pa. St. 47.

² *Pierce v. Bryant*, 5 Allen, 91; *Buckley v. Bramhall*, 24 How. Pr. 455. The failure of the clerk to record the statutory certificate of the formation of a limited partnership does not ren-

der a special partner liable as a general partner: *Manhattan Co. v. Laimbeer*, 108 N. Y. 578.

³ *Vandike v. Roskam*, 67 Pa. St. 330.

⁴ *Pittsburgh Melting Co. v. Reese*, 118 Pa. St. 355.

⁵ *Coffin's Appeal*, 106 Pa. St. 290.

⁶ 1 *Stimson's American Statute Law*, sec. 5375.

liable personally for the debts of the partnership, nor liable at all beyond the sum contributed by them to the capital. But the special partner becomes liable as a general partner when he interferes in the business, against the provisions of the statutes before referred to, or is guilty of fraud in the partnership affairs.¹ A special partner will be held liable as a general partner for purchases made under his representations that such is his interest.² A special partnership will become a general partnership, and the special partners liable as general partners, if the place of business is removed from the county in which it was established without filing a new certificate in the clerk's office of the county to which it has been removed.³ If a special partner buys out the entire firm property during the existence of a limited partnership, and continues the business in his own name and for his own account, he interferes with the firm business contrary to the provisions of statutes relating to limited partnerships, and renders himself liable as a general partner from the very commencement of the partnership.⁴ Where a limited partnership act, like the New Jersey act, requires a certificate of a cash payment, and provides that in case of a false statement the liability shall be that of a general partner, the liability is incurred by giving a check, not paid until a month afterwards, instead of cash.⁵ A special partner is liable to a firm creditor when he has withdrawn part of the firm capital or profits in violation of the statute, but execution upon a judgment against the firm must have been returned unsatisfied before the creditor can enforce the liability of the special partner.⁶ Under the Missouri

¹ 1 Stimson's American Statute Law, secs. 5372 et seq.; *Richardson v. Hogg*, 33 Pa. St. 153; *Barrows v. Downs*, 9 R. I. 446; *Hogg v. Ellis*, 8 How. Pr. 473.

² *Barrows v. Downs*, 9 R. I. 446.

³ *Riper v. Poppenhausen*, 43 N. Y. 68.

⁴ *First Nat. Bank v. Whitney*, 4 Lans. 34.

⁵ *McGinnis v. Flynn*, 23 Blatchf. 465; *McGinnis v. Farrelly*, 27 Fed. Rep. 33.

⁶ *Bell v. Merrifield*, 23 Hun, 219.

statute regulating limited partnerships, the cash contribution of the special partner may be made after as well as before the formation of the partnership.¹

Under the Pennsylvania partnership act of 1836, a special partner, whose contribution has, without his privity, been misappropriated by a general partner, is not liable as a general partner for the firm debts.² Nothing in the New York limited partnership act prohibits a limited partnership from buying goods for its business from the special partner, or from making payment from the money paid in to the partnership by the special partner in cash as his capital. And the transaction being in good faith, it is immaterial that its effect is substantially the same as though the special partner had contributed the goods as his capital instead of cash, which the law would not allow.³ The Missouri statute, which postpones the special partner until the other creditors are satisfied, includes advances made by him to the partnership by way of a loan.⁴ The firm name must be composed entirely of the names of general partners, without the addition of the words "and company," or any equivalent. The insertion of the name of a special partner will render him liable as a general partner. Suits are to be brought in the name of and against the general partners, as if there were no special partners. No sum can be withdrawn from the firm by the special partner, as interest and profits, when these cannot be paid without the impairment of the capital; nor upon the insolvency of the concern will he be allowed to claim the amount contributed as a creditor. If the capital is so impaired, the special partner is required to make it good. In case of insolvency, special partners cannot claim as creditors until other creditors are satisfied.

¹ *Selden v. Hall*, 21 Mo. App. 452.

² *Metropolitan Bank v. Sirret*, 97

³ *Seibert v. Bakewell*, 87 Pa. St. N. Y. 320; 15 Abb. N. C. 318.

506.

⁴ *Jaffe v. Krum*, 88 Mo. 669.

ILLUSTRATIONS.—On the formation of a limited partnership, the special partner gave his certified check for ten thousand dollars, the amount of his capital, which was deposited to the credit of the new firm. Afterward, on the same day, the firm gave him their checks on the same bank for some seven thousand six hundred dollars, the amount appearing to his credit on the books of a former firm, composed of the same members. *Held*, that this was not an actual cash contribution as required by the statute, and the special partner was liable as a general partner: *Lineweaver v. Slagle*, 64 Md. 465; 54 Am. Rep. 775. A partnership was formed by a certificate and affidavits dated and filed December 23, 1870, to commence January 1, 1871. The affidavits and certificates stated that the special partner's capital had been actually and in good faith paid in cash; in fact, the special partner gave his checks for the amount, dated December 31, 1870, which were paid January 2, 1871. *Held*, that the statements were false within the meaning of the statute, and the special partner was liable as a general partner for the debts of the firm: *Durant v. Abendroth*, 69 N. Y. 148; 25 Am. Rep. 158. M. entered a firm upon the understanding that he was to be a special partner with limited liability. He paid a specified sum toward the capital stock, upon which he was to receive legal interest and one fourth of the profits. The statute in relation to limited partnerships was not complied with, but M.'s name did not appear in the firm, and he took no part in the management of the business. M. was induced to enter the firm by the fraudulent representations of his partners, and withdrew as soon as he discovered the fraud. *Held*, that M. was a general partner, and as such was liable for the contracts of the firm while he so remained: *Tournade v. Hagedorn*, 5 Thomp. & C. 388; *Tournade v. Methfessel*, 3 Hun, 144. An affidavit stated that the sum paid in by the special partner was actually paid in cash. As a matter of fact the payment was coupled with an agreement that the cash should be applied in payment of indebtedness for goods already in stock. *Held*, that this agreement did not conflict with the statement of the affidavit, and did not render the special partner liable as a general partner: *Anderson v. Stone*, 24 Ill. App. 342.

§ 692. **Dissolution of.**—By the statutes of most of the states, any alteration in the number or persons of the partnership or the nature of the business is deemed a dissolution. In others, any alteration of the capital or shares of any special partner, or in any matter specified in the original certificate, or the death of a partner, or anything

which would work the dissolution of a general partnership. In most of the states, any partnership carried on after such alterations have taken place becomes a general one. The dissolution cannot take place by the voluntary acts of the parties until a certificate of the dissolution is filed in the office where the original certificate was filed.¹ The certificate of the dissolution of a limited partnership must comply with the statutes, or such partnership will continue.²

¹ Stimson's American Statute Law,
secs. 5351 et seq.

² In re Terry, 5 Biss. 110.

CHAPTER XXXVIII.

JOINT-STOCK COMPANIES.

§ 693. Joint-stock companies — At common law.

§ 694. Under statutes.

§ 693. **Joint-stock Companies—At Common Law.**—A joint-stock company or association is an association of persons owning together a capital stock which they have devoted to a common purpose, under an organization similar to that of a corporation. But they are not incorporated. Hence they are a species of limited partnerships, except that they have no general partners; they are all general ones. In England they are regulated by statute, and are in that country more known than in the United States. They are, in this country, it seems, except when organized under a statute, as in New York, merely partnerships, and subject to the liabilities of partnerships.¹ The members are liable for all the debts of the company, no matter what the private arrangements among themselves may be;² and this, notwithstanding they attempt to arrogate to themselves the attributes of corporations by doing business under a corporate name, and appointing certain of their members to act as directors.³ The fact that the members call themselves stockholders, and the

¹ *Dennis v. Kennedy*, 19 Barb. 517; *Townsend v. Goewey*, 19 Wend. 424, 428; *Cross v. Jackson*, 5 Hill, 478; *Williams v. Bank of Michigan*, 7 Wend. 539; *In re Fry*, 4 Phila. 129; *Kramer v. Arthurs*, 7 Pa. St. 165; *Vigers v. Sainet*, 13 La. 300; *Tenney v. N. E. Protective Union*, 37 Vt. 64; *Manning v. Gasharie*, 27 Ind. 399; *Hedge's Appeal*, 63 Pa. St. 273; *Tappan v. Bailey*, 4 Met. 535; *Robbins v. Butler*, 24 Ill. 387; *Babb v. Reed*, 5 Rawls, 151; *Lafond v. Deems*, 52 How. Pr. 41; 1 Abb. N. C. 318; *Wells v. Gates*, 18 Barb. 554.

² *Robbins v. Butler*, 24 Ill. 387; *Hess v. Werts*, 4 Serg. & R. 356; *Vigers v. Sainet*, 13 La. 300; *Tenney v. N. E. Protective Union*, 37 Vt. 64; *Manning v. Gasharie*, 27 Ind. 399; *Hedge's Appeal*, 63 Pa. St. 273; *Tappan v. Bailey*, 4 Met. 535; *Outler v. Thomas*, 25 Vt. 73. See also *Skinner v. Dayton*, 19 Johns. 537; *Thomas v. Ellmaker*, 1 Pars. Cas. 98.

³ *Hess v. Werts*, 4 Serg. & R. 356; *Williams v. Bank of Michigan*, 7 Wend. 539, 542, per Walworth Chancellor; *McGreary v. Chandler*, 58 Me. 537.

firm an association, and that the number of members is considerable, makes not the slightest difference as to the real nature of the association.¹ In all actions at law by and against such unincorporated associations, all the members must be made parties to the same, as in the case of an ordinary partnership. No action can be maintained by or against the association in the character of a society possessing corporate rights.² Nor can such an association sue in the name of any officer of the association, or in the name of their trustees.³ Nor can any action at law be maintained by one member against another which involves an examination of the partnership accounts.⁴ The directors of such an unincorporated joint-stock company stand in the relation of trustees to the stockholders; and any gain they may reap in the discharge of their official duties, and while they continue to be invested with the fiduciary capacities, inures to the benefit of the *cestuis que trust*.⁵ But the transfer of a member's interest does not, as in the case of an ordinary partnership, work a dissolution; nor does his death.⁶

§ 694. **Under Statutes.**—In New York they are recognized and regulated by statute.⁷ Under these statutes, they can, like corporations, sue and be sued in a single or collective name, to wit, the name of the president or treasurer. Their property or capital is represented in shares or certificates of stock, differing in no respect from shares and stock certificates in corporations. The death of a member, his insolvency, or the sale or transfer of his interest, is not a dissolution of the company. They have

¹ Wells v. Gates, 18 Barb. 554; Dennis v. Kennedy, 19 Barb. 517.

² Pipe v. Bateman, 1 Iowa, 369; McGreary v. Chandler, 58 Me. 537; Williams v. Bank, 7 Wend. 542.

³ Niven v. Spickerman, 12 Johns. 401.

⁴ Ballard v. Kinney, 10 Cal. 60.

⁵ In re Fry, 4 Phila. 129.

⁶ Tyrrell v. Washburn, 6 Allen, 466;

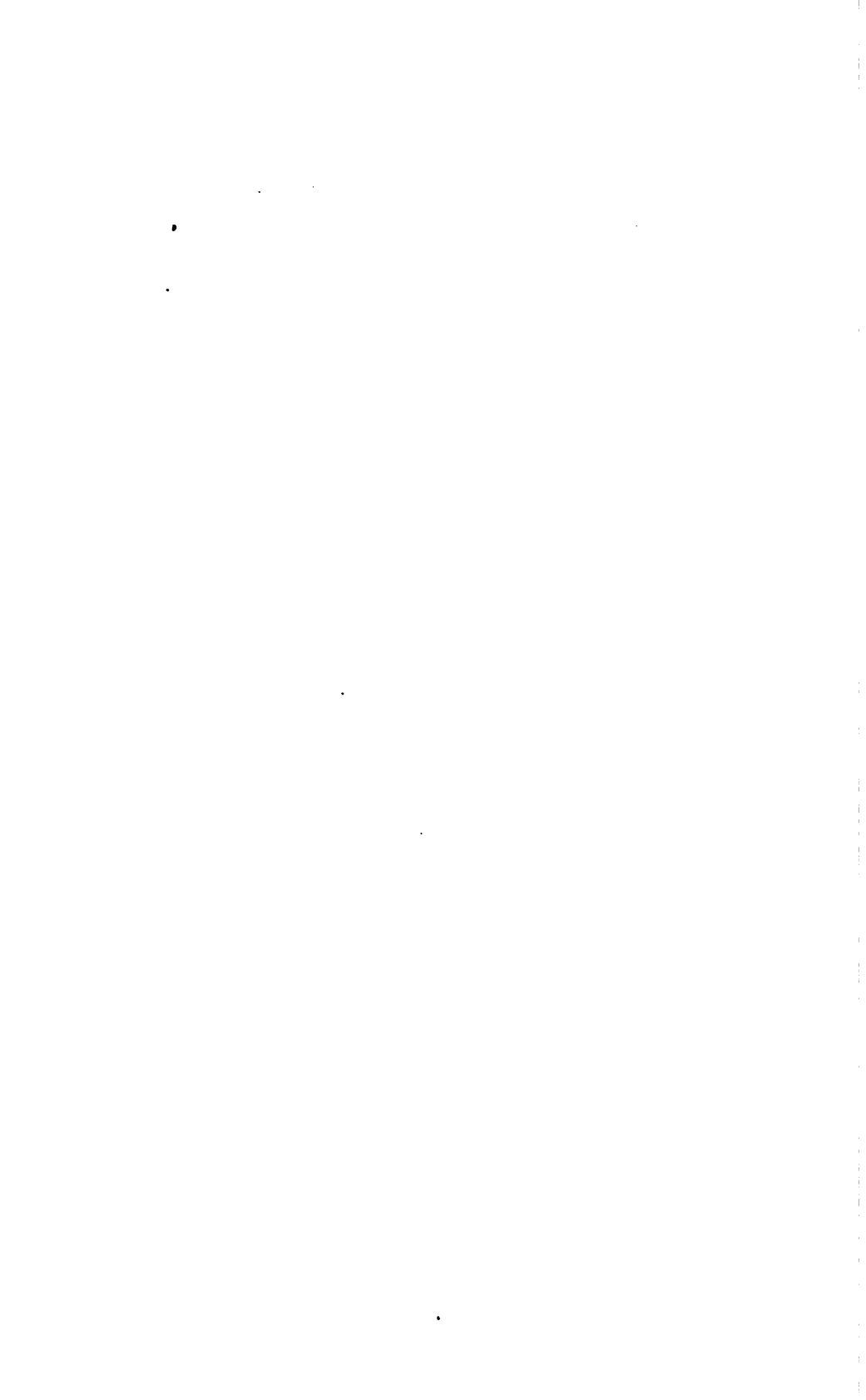
Tenney v. Protective Union, 37 Vt. 64. So as to mining partnerships in California: Jones v. Clark, 42 Cal. 180; Taylor v. Castle, 42 Cal. 367.

⁷ Laws of 1849, c. 253, p. 389; Laws of 1851, c. 445, p. 838; Laws of 1853, c. 153, p. 283; Laws of 1854, c. 245, p. 558; Laws of 1867, vol. 1, c. 289, p. 576.

perpetual succession, or what is sometimes called the immortality of corporations. They can take and hold real estate and personal estate in a collective capacity and in perpetual succession. They have, however, no common seal, and the individual members may, in the mode prescribed by the statute, be made personally liable for the debts of the association.¹ It has been held in the federal courts² that a New York joint-stock company, possessing the right by the law under which it was organized to sue and be sued in the name of its president or treasurer, was a citizen of the state of New York in the same sense that corporations are citizens of the states under whose laws they are organized; and that such joint-stock company might, by the comity of states, sue and be sued in the name of such officer in the federal courts as a citizen of New York, even though share-holders of such joint-stock company were citizens of the same state as the adverse party to the suit. But in Massachusetts it is held that the statutes in question are local in their operation as regards remedies for debt against the company; that in Massachusetts such a company is a mere partnership, and that the members may be sued in Massachusetts in the first instance as partners for such a debt, notwithstanding the provision of the New York statute that no suit shall be maintained on the demand against the individual members until judgment has been rendered against the company in the name of the president or treasurer, and execution thereon returned unsatisfied.³

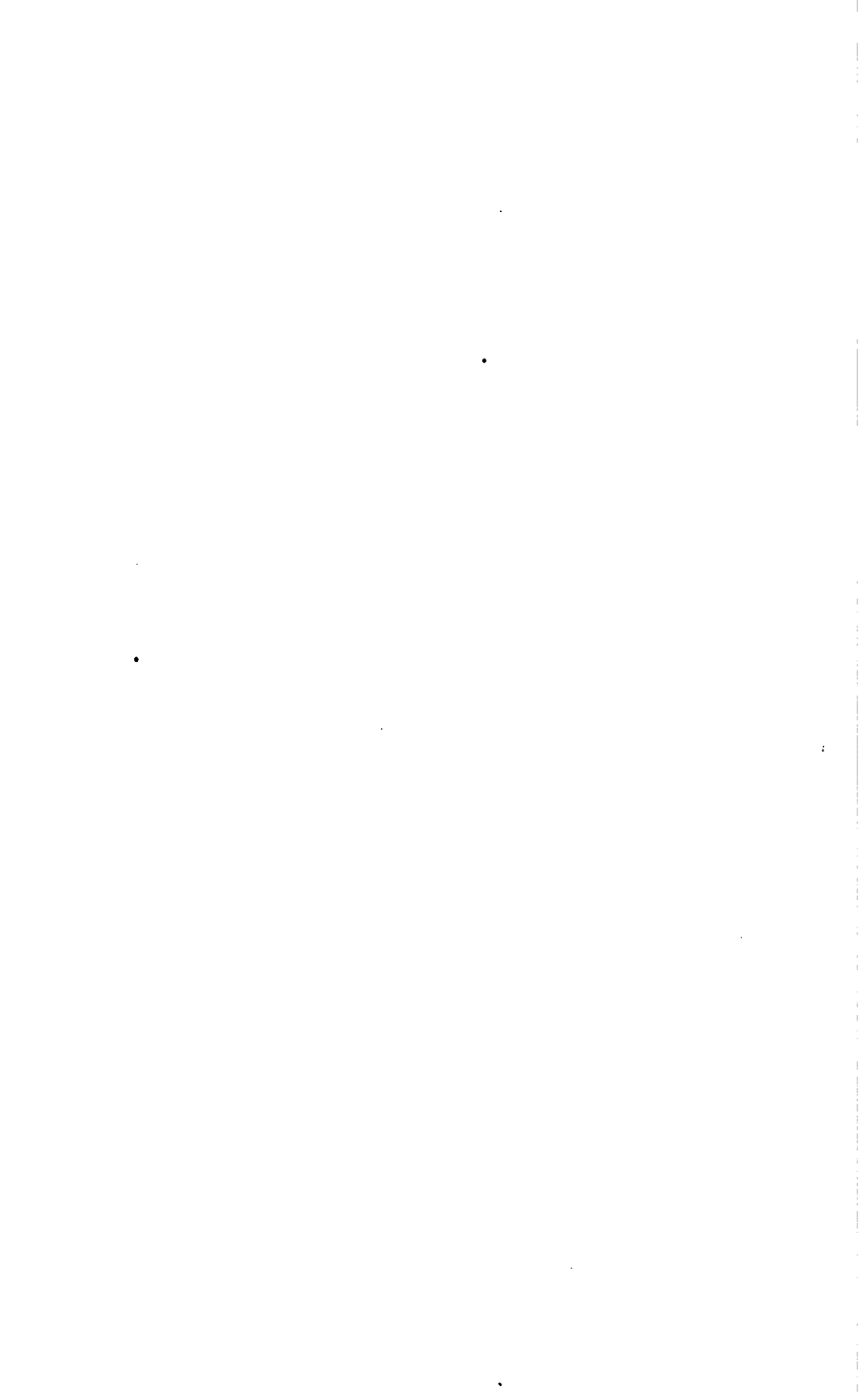
¹ *Waterbury v. Merchants' etc. Ex. Co.*, 50 Barb. 157; 3 Abb. Pr., N.S., 163. ² *Taft v. Warde*, 106 Mass. 518; 111 Mass. 518; *Gott v. Dinsmore*, 111

³ *Fargo v. R. R. Co.*, 13 Chic. L. N. Mass. 45.



TITLE IV.

HUSBAND AND WIFE.



TITLE IV.

HUSBAND AND WIFE.

CHAPTER XXXIX.

THE AGREEMENT TO MARRY.

- § 695. Mutual promises to marry valid — Action lies for breach.
- § 696. Promise may be implied — Evidence.
- § 697. At what time contract to be performed — What is a refusal.
- § 698. When promise to marry not enforceable.
- § 699. Defenses to the action.
- § 700. Measure of damages — Evidence as to.
- § 701. Evidence in aggravation and mitigation of damage

§ 695. Mutual Promises to Marry Valid — Action Lies for Breach. — A mutual contract to marry is valid; it is essential, however, that the promises shall be mutual. A promise by a man to marry a woman without any engagement on her part to marry him is not binding.¹ The breach of a mutual contract to marry gives a right of action² to either the man or the woman.³ But such action does not survive to the personal representative,⁴ nor can it be prosecuted after the death of the defendant.⁵ So it

¹ Russell v. Cowles, 15 Gray, 582; 77 Am. Dec. 391; Ellis v. Guggenheim, 20 Pa. St. 287; Standiford v. Gentry, 32 Mo. 477; Espy v. Jones, 37 Ala. 379; Allard v. Smith, 2 Met. (Ky.) 277; Burnham v. Cornwell, 16 B. Mon. 284; 63 Am. Dec. 529; see note to Burnham v. Cornwell, 63 Am. Dec. 532-548.

² Wrightman v. Coates, 15 Mass. 1; 8 Am. Dec. 77. It is an action *ex contractu*, and not *ex delicto*; Malone v. Ryan, 14 R. I. 614; Schreckengast v. Ealy, 16 Neb. 510.

³ Kelly v. Renfro, 9 Ala. 323; 44 Am. Dec. 441; Harrison v. Cage, 1 Ld. Raym. 386; and although the other is an infant, and his promise is not binding: Cannon v. Alsbury, 1 A. K. Marsh. 76; 10 Am. Dec. 709. But infancy on the part of the defendant is a good defense: Rush v. Wick, 31 Ohio St. 521; 27 Am. Rep. 523.

⁴ Chamberlain v. Williamson, 2 Maule & S. 408.

⁵ Lattimore v. Simmons, 13 Serg. & R. 183; Wade v. Kalbfleisch, 58 N. Y.

abates upon the marriage of the parties.¹ Engagements to marry are not among the contracts which, by the statute of frauds, must be reduced to writing.² But an unwritten promise to marry after more than a year is void under the statute of frauds.³

A woman engaged to marry a man has an insurable interest in his life.⁴

ILLUSTRATIONS. — A girl, over eighteen but under twenty-one, was induced, in consideration of the promise of the putative father of her bastard child, against whom she held a judgment for sums to be paid for maintenance of the child, that he would marry, to vacate the judgment. *Held*, that, on his failure to marry her, she could, on attaining twenty-one, disaffirm her contract and sue to have the satisfaction vacated: *Reish v. Thompson*, 55 Ind. 34.

§ 696. **Promise may be Implied — Evidence.** — An express promise to marry is not essential, but the promise may be implied from circumstances;⁵ thus the defend-

282; 17 Am. Rep. 250; *Smith v. Sherman*, 4 Cush. 408; *Hayden v. Vreeland*, 37 N. J. L. 372; 18 Am. Rep. 723.

¹ *Harris v. Tyson*, 63 Ga. 629; 36 Am. Rep. 126.

² *Short v. Stotts*, 58 Ind. 29.

³ *Nichols v. Weaver*, 7 Kan. 373.

⁴ *Chisholm v. Nat. etc. Life Ins. Co.*, 52 Mo. 213; 14 Am. Rep. 414.

⁵ *Wrightman v. Coates*, 15 Mass. 1; 8 Am. Dec. 77; *Parker, C. J.*, saying: "The exception taken is, that there was no direct evidence of an express promise of marriage made by the defendant. The objection implies that there was indirect evidence from which such a promise may have been inferred; and the jury were instructed that if, from the letters written by the defendant, as well as his conduct, they believed that a mutual engagement subsisted between the parties, they ought to find for the plaintiff. They made the inference, and without doubt it was justly drawn. Is it, then, necessary than an express promise in direct terms should be proved? A necessity for this would imply a state of public manners by no means de-

sirable. That young persons of different sexes, instead of having their mutual engagement inferred from a course of devoted attention and apparently exclusive attachment, which is now the common evidence, should be obliged, before they consider themselves bound, to call witnesses or execute instruments under hand and seal would be destructive to that chaste and modest intercourse which is the pride of our country, and a boldness of manners would probably succeed by no means friendly to the character of the sex or the interests of society. A mutual engagement must be proved to support this action, but it may be proved by those circumstances which usually accompany such a connection. No case has been cited in support of the defendant's objection. On the contrary, it is very clear, from all the English cases, that a promise may be inferred, and that direct proof is not necessary. In the case before referred to (*Hitton v. Mansell*, 3 Salk. 16), Lord Holt says expressly that where one has promised, and the behavior of the other is such as to countenance the belief that an engagement has taken

ant's promise may be inferred from attentions bestowed on the female for a long time;¹ or from the interchange of love-letters.² But mere attentions alone or visits are not sufficient to establish a mutual promise.³ When the defendant's promise to marry is once shown, it may then be proved that plaintiff demeaned herself as if she concurred in and approved of his promise, and thus establish the promise on her part.⁴ The plaintiff's promise may be inferred from her making no objection at the time of the offer, and her afterwards receiving visits from defendant as a suitor,⁵ or from her having appeared to be sincerely attached to defendant,⁶ or from her having procured her wedding outfit and cake,⁷ or from her encouragement of his attentions,⁸ or from her declarations long before the suit was brought,⁹ or from her conduct and apparent distress on hearing of the defendant's marriage to another.¹⁰ But preparations made by her in the absence of the defendant are not sufficient to raise an implied promise on the plaintiff's part,¹¹ nor purchasing furniture,¹² nor her consent to his having connection with her.¹³ Her declara-

place, this is evidence enough of a promise on the part of the person so conducting; and the same principle will apply to both parties."

¹ *Hotchkiss v. Hodge*, 38 Barb. 121; *Blackburn v. Mann*, 85 Ill. 222; *Rockafellow v. Newcomb*, 57 Ill. 186; *Homan v. Earle*, 53 N. Y. 267; *Wells v. Padgett*, 8 Barb. 323; *Coil v. Wallace*, 24 N. J. L. 291.

² *Tefft v. Marsh*, 1 W. Va. 38.

³ *Walmsley v. Robinson*, 63 Ill. 41; 14 Am. Rep. 111; *Perkins v. Hersey*, 1 R. I. 493; *Whitcomb v. Wolcott*, 21 Vt. 386; *Munson v. Hastings*, 12 Vt. 546; 36 Am. Dec. 345; *Burnham v. Cornwell*, 16 B. Mon. 284; 63 Am. Dec. 529. In the Illinois case (*Walmsley v. Robinson*, 63 Ill. 41; 14 Am. Rep. 111), it is said: "It by no means follows because a gentleman is the suitor of a lady, and visits her frequently, that a marriage engagement exists between them. If this were so, it would be dangerous for an unmarried man to pay attention to an

unmarried woman. Juries always lean towards the woman, and no man would be safe from the contrivances of an artful and designing female whose company might please him."

⁴ *Thurston v. Cavereor*, 8 Iowa, 155; *Royal v. Smith*, 40 Iowa, 615; *Burnham v. Cornwell*, 16 B. Mon. 284; 63 Am. Dec. 529; *Wrightman v. Coates*, 15 Mass. 1; 8 Am. Dec. 77; *Honeyman v. Campbell*, 5 Shaw & W. 144; 2 Dow & C. 282; *Green v. Spencer*, 3 Mo. 318; 26 Am. Dec. 672.

⁵ *Daniels v. Bowles*, 2 Car. & P. 553.

⁶ *Sprague v. Craig*, 51 Ill. 283.

⁷ *Wilcox v. Green*, 23 Barb. 639.

⁸ *Leckey v. Blosser*, 24 Pa. St. 401.

⁹ *Peppinger v. Lowe*, 6 N. J. L. 384.

¹⁰ *King v. Kersey*, 2 Ind. 402.

¹¹ *Russell v. Cowles*, 15 Gray, 582; 77 Am. Dec. 391.

¹² *Weaver v. Bachert*, 2 Pa. St. 80; 44 Am. Dec. 159.

¹³ *Weaver v. Bachert*, 2 Pa. St. 80; 44 Am. Dec. 159.

tions to third parties, made in defendant's absence, to the effect "that she was engaged to defendant, and he was going to marry her," are not admissible as evidence of her promise to marry defendant.¹

§ 697. At What Time Contract to be Performed — What is a Refusal to Perform. — When there is no time fixed for the performance of the contract to marry, the law construes it as a contract to marry within a reasonable time;² and what is a reasonable time depends upon the ages and pecuniary ability of the parties.³ A request or offer to the defendant to perform the promise, it is held in some cases, is necessary where no particular time has been fixed by the parties;⁴ but no request or demand is necessary where he has expressly or impliedly renounced his promise,⁵ or has married another person,⁶ and the request may be implied from circumstances or the actions of the parties.⁷ The omission to marry upon a particular day is not a breach of the contract. "It necessarily continues in force until the one or the other of the parties, by conduct or by words, evinces that he or she is unwilling to proceed to the ordinary result. When this takes place, and not until then, does any right of action accrue to either party."⁸ Where a time has been fixed for the marriage, and before that day the defendant marries another, the plaintiff may bring suit at once.⁹ So where he renounces his promise before the day fixed for per-

¹ *McPherson v. Ryan*, 59 Mich. 33.

² *Nichols v. Weaver*, 7 Kan. 378; *Blackburn v. Mann*, 85 Ill. 222; *Clark v. Pendleton*, 20 Conn. 495; *Stevenson v. Pettis*, 12 Phila. 468.

³ *Wagenseller v. Simmers*, 97 Pa. St. 465.

⁴ *Kurtz v. Frank*, 76 Ind. 594; 40 Am. Rep. 275; *Prescott v. Schuyler*, 32 Ill. 312; *Burks v. Shain*, 2 Bibb, 341; 5 Am. Dec. 616; *Burnham v. Cornwell*, 16 B. Mon. 288; 63 Am. Dec.

529; *Kniffen v. McConnell*, 30 N. Y. 285; *contra*, *Johnson v. Caulkins*, 1 Johns. Cas. 116; 1 Am. Dec. 102.

⁵ *Kurtz v. Frank*, 76 Ind. 594; 40 Am. Rep. 275; *Coit v. Wallace*, 24 N. J. L. 291.

⁶ *King v. Kersey*, 2 Ind. 402.

⁷ *Kniffen v. McConnell*, 30 N. Y. 285; *Green v. Spencer*, 3 Mo. 318; 26 Am. Dec. 672.

⁸ *Kelly v. Renfro*, 9 Ala. 325; 44 Am. Dec. 441.

⁹ *Sheehan v. Barry*, 27 Mich. 223.

formance, the other may bring her action at once.¹ And where he promises to marry upon his father's death, and he renounce during his lifetime, she is justified in bringing an immediate action.²

ILLUSTRATIONS. — The parties had engaged to marry "in the fall," and one of them in October announced his determination not to perform the contract. *Held*, that an action for breach of promise might be brought immediately: *Burtis v. Thompson*, 42 N. Y. 246; 1 Am. Rep. 516. Two Hebrews fixed a day for their marriage, which they subsequently ascertained to be a day on which, by the customs of the church, marriage was forbidden. It had been agreed between them that the marriage, when celebrated, should be in accordance with the Hebrew usages. *Held*, that an action for breach of promise based merely on the refusal to marry on that particular day could not be maintained: *Stone v. Appel*, 12 Ill. App. 582.

§ 698. **When Promise to Marry not Enforceable.**—A promise made in consideration of the plaintiff consenting to illicit intercourse is void;³ or by a married man, to take effect when he has obtained a divorce from his wife;⁴ or where the parties are by law forbidden to marry;⁵ or where both parties are married, and known to be so by each other;⁶ or where the defendant was incurably impotent.⁷ But a defendant cannot plead that he was already married when he made the promise, if it was not known to the plaintiff.⁸ The Michigan statute, which renders males of

¹ *Kurtz v. Frank*, 76 Ind. 594; 40 Am. Rep. 275; *Holloway v. Griffith*, 32 Iowa, 409; 7 Am. Rep. 208; *Burtis v. Thompson*, 42 N. Y. 246; 1 Am. Rep. 516.

² *Frost v. Knight*, L. R. 7 Ex. 111.

³ *Weaver v. Bachert*, 2 Pa. St. 80; *Baldy v. Stratton*, 11 Pa. St. 316; *Steinfeld v. Levy*, 16 Abb. Pr., N. S., 26; *Hanks v. Naglee*, 54 Cal. 51; 35 Am. Rep. 67; *Boigner v. Boulon*, 54 Cal. 146; *Goodall v. Thurman*, 1 Head, 209. But not if the promise follows the seduction: *Hotchkiss v. Hodge*, 38 Barb. 117.

⁴ *Noice v. Brown*, 38 N. J. L. 228; 20 Am. Rep. 388; 39 N. J. L. 133; 23 Am. Rep. 213.

⁵ *Campbell v. Crampton*, 1 Blatchf. 150; 8 Abb. N. C. 363; *Paddock v. Robinson*, 63 Ill. 99; 14 Am. Rep. 112; *Haviland v. Halstead*, 34 N. Y. 643.

⁶ *Paddock v. Robinson*, 63 Ill. 99; 14 Am. Rep. 112.

⁷ *Gulick v. Gulick*, 41 N. J. L. 13; and see *Gring v. Lerch*, 112 Pa. St. 244; 56 Am. Rep. 314.

⁸ *Stevenson v. Pettis*, 12 Phila. 468; *Blattmacher v. Saal*, 29 Barb. 22; *Kelly v. Riley*, 106 Mass. 339; 8 Am. Rep. 336. But if the woman, after learning the fact of his marriage, consents to the continuance of the contract, this will go in mitigation of damages: *Cover v. Davenport*, 1 Heisk. 368; 2 Am. Rep. 706.

the age of eighteen and females of the age of sixteen competent to contract marriage, makes the marriage actually entered into by them valid; but it does not enable persons under the age of twenty-one to make valid executory contracts of marriage, for breach of which suits may be brought.¹

ILLUSTRATIONS.—A married man, representing himself to be unmarried, entered into a contract of marriage with a woman who at the time was ignorant of his marriage. *Held*, that the fact that she afterwards became aware of his marriage, and did not repudiate her contract, but still agreed to marry him when she should be able to, by reason of an expected separation from his wife, did not affect his liability in an action by her for breach of promise, but was relevant on the question of damages: *Cover v. Davenport*, 1 Heisk. 368; 2 Am. Rep. 706.

§ 699. Defenses to the Action.—"Whatever misconduct in the party who brings the action, unknown to the other party when the contract was made, or occurring subsequently, and when made known to him he refuses to fulfill the promise, tending necessarily to destroy the confidence essential to connubial happiness, and suited to defeat the great purposes of the marriage relation, may properly absolve him from his obligation, and be a defense."² Thus it is a good defense that the defendant has discovered that the plaintiff is a woman loose and immoral in her character;³ that she concealed from him the fact that she had previously had a bastard child;⁴ or that

¹ *Frost v. Vought*, 37 Mich. 65.

² *Leeds v. Cook*, 4 Esp. 256. It is essential that the party shall have been ignorant of the fact. A man knowingly promising to marry a notorious prostitute would be nevertheless bound: *Burnett v. Simpkins*, 24 Ill. 264; *Snowman v. Wardwell*, 32 Me. 275; *Berry v. Bakeman*, 44 Me. 164; *Copehart v. Carradine*, 4 Strob. 42; *Von Storch v. Griffin*, 77 Pa. St. 504; *Johnson v. Smith*, 3 Pitts. 184; *Irving v. Greenwood*, 1 Car. & P. 350; *Sprague v. Craig*, 51 Ill. 288; *Bench v. Merrick*,

1 Car. & K. 463; *Woodard v. Bellamy*, 2 Root, 354.

³ *Butler v. Eschleman*, 18 Ill. 44; *Palmer v. Andrews*, 7 Wend. 143; *Berry v. Bakeman*, 44 Me. 164; *Bell v. Eaton*, 28 Ind. 468; 92 Am. Dec. 329; *Goodall v. Thurman*, 1 Head, 209; *Copehart v. Carradine*, 4 Strob. 42. But *aliter* where he knew of her lewd character when he made the promise: *Kelley v. Highfield*, 15 Or. 277.

⁴ *Bell v. Eaton*, 28 Ind. 468; 92 Am. Dec. 329.

she has been raped, even though without her fault.¹ Of course it is a good defense that the plaintiff had released the defendant from his promise.²

It is no defense that plaintiff previously promised to marry another;³ nor that the defendant made his promise in bad faith;⁴ nor that he broke his contract because he felt that marriage would not tend to the happiness of both parties;⁵ nor that the plaintiff has, since the promise, excessively drunk liquors;⁶ nor that he had heard stories of the plaintiff's improper conduct in his absence;⁷ nor that he had offered to marry her since the trial commenced;⁸ nor that the plaintiff had previously been insane and confined in an asylum.⁹ The defendant may show, in mitigation of damages, that at the time of the breach he was afflicted with an incurable disease,¹⁰ or that plaintiff drank intoxicating liquors to excess, or of other misconduct showing that plaintiff would be an unfit companion in married life.¹¹

ILLUSTRATIONS.—Defendant admitted the engagement and his refusal to perform. *Held*, that the fact that plaintiff returned to him the engagement ring after he told her that he loved another did not constitute an agreement on her part to rescind the contract: *Krazberger v. Roiter*, 91 Mo. 404; 60 Am. Rep. 262.

§ 700. Measure of Damages—Evidence as to.—The jury in such cases are the sole judges of the amount of damages, and their verdict will seldom be disturbed.¹² They

¹ 1 Wait on Actions and Defenses, 726, citing 2 Parsons on Contracts, 67.

² *Davis v. Bomford*, 6 Hurl. & N. 245; *Grant v. Willey*, 101 Mass. 356; *Al-lard v. Smith*, 2 Met. (Ky.) 297.

³ *Roper v. Clay*, 18 Mo. 318; 59 Am. Dec. 314.

⁴ *Prescott v. Guylor*, 32 Ill. 312.

⁵ *Coolidge v. Neat*, 129 Mass. 146.

⁶ *Button v. McCauley*, 1 Abb. App. 282.

⁷ *Willard v. Stone*, 7 Cow. 22; 17 Am. Dec. 496.

⁸ *Bennett v. Beam*, 42 Mich. 346; 36 Am. Rep. 442.

⁹ *Baker v. Cartwright*, 10 Com. B., N. S., 124.

¹⁰ *Sprague v. Craig*, 51 Ill. 288.

¹¹ *Button v. McCauley*, 1 Abb. App. 282.

¹² *Douglas v. Gausman*, 68 Ill. 170; *Denslow v. Van Horn*, 16 Iowa, 477; *Royal v. Smith*, 40 Iowa, 615; *Southard v. Rexford*, 6 Cow. 254; *Wilken v. Johnson*, 58 Mo. 600; *Goodall v. Thurman*, 1 Head, 209.

may give exemplary damages.¹ But unless the defendant's conduct has been wanton or malicious, or unless he has unnecessarily wounded the feelings or injured the reputation of the woman, punitive damages are not recoverable.² The jury may consider the pecuniary as well as the social standing of the defendant, as tending to show the condition in life which the plaintiff would have secured by a consummation of the marriage contract;³ the length of the engagement;⁴ her lack of independent means;⁵ her affection for the defendant;⁶ the injury to her feelings;⁷ the pecuniary advantages which would have resulted from the performance, as well as the pain and mortification occasioned by the breach of, the contract;⁸ and her expenses in preparing for the marriage.⁹

§ 701. Evidence in Aggravation and Mitigation of Damages.—It has been held in some cases that evidence that the defendant seduced the plaintiff is not admissible for the purpose of increasing the damages.¹⁰ But the weight of authority permits such evidence for this purpose.¹¹ An unsuccessful attempt to show that the plaintiff

¹ *Coryell v. Colbaugh*, 1 N. J. L. 77; 1 Am. Dec. 192; *Davis v. Single*, 27 Mo. 600; *Southard v. Rexford*, 6 Cow. 254; *Fidler v. McKinley*, 21 Ill. 308; *White v. Thomas*, 12 Ohio St. 313; 80 Am. Dec. 347; *Johnson v. Jenkins*, 24 N. Y. 252; *Thorn v. Knapp*, 42 N. Y. 474; 1 Am. Rep. 561.

² *Dupont v. McAdow*, 6 Mont. 226.

³ *Holloway v. Griffith*, 32 Iowa, 409; 7 Am. Rep. 208; *Lawrence v. Cook*, 56 Me. 187; 96 Am. Dec. 443; *Olson v. Solveson*, 71 Wis. 663.

⁴ *Vanderpool v. Richardson*, 52 Mich. 336; *Grant v. Willey*, 101 Mass. 356.

⁵ *Vanderpool v. Richardson*, 52 Mich. 336.

⁶ *Harrison v. Swift*, 13 Allen, 144.

⁷ *Collins v. Mack*, 31 Ark. 685; *Reed v. Clark*, 47 Cal. 194; *Dupont v. McAdow*, 6 Mont. 226.

⁸ *Royal v. Smith*, 40 Iowa, 615.

⁹ *Smith v. Sherman*, 4 Cush. 408; *Dunlap v. Clark*, 25 Ill. App. 573.

¹⁰ *Burks v. Shain*, 2 Bibb, 341; 5 Am. Dec. 616; *Weaver v. Bachert*, 2 Pa. St. 80; 44 Am. Dec. 159; *Breeze, J.*, in *Fidler v. McKinley*, 21 Ill. 322.

¹¹ *Coryell v. Colbaugh*, 1 N. J. L. 77; 1 Am. Dec. 192; *Coit v. Wallace*, 24 N. J. L. 291; *Wells v. Padgett*, 8 Barb. 323; *Kelley v. Highfield*, 13 Or. 277; *Giese v. Schultz*, 69 Wis. 321; *Kniffen v. McConnell*, 30 N. Y. 285; *Tubbs v. Van Kleeck*, 12 Ill. 447; *Bennett v. Simpkins*, 24 Ill. 264; *Bennett v. Beam*, 42 Mich. 346; 36 Am. Rep. 442; *Sherman v. Rawson*, 102 Mass. 395; *Roper v. Clay*, 18 Mo. 385; 59 Am. Dec. 314; *Conn v. Wilson*, 2 Tenn. 234; 5 Am. Dec. 663; *Goodall v. Thurman*, 1 Head, 213; *Kelly v. Riley*, 106 Mass. 339; 8 Am. Rep. 336; *Sauer v. Schulenberg*, 33 Md. 288; 3 Am. Rep. 174; *Whalen v. Layman*, 2 Blackf. 194; 18 Am. Dec. 157; *Green v. Spencer*, 3 Mo. 318; 26 Am. Dec. 675; *Fidler v. McKinley*, 21 Ill. 322; *Williams v. Hollingsworth*, 6 Baxt. 12.

was unchaste will increase the damages,¹ unless the charge was made in good faith and on reasonable grounds.² In mitigation of damages, evidence of the plaintiff's indecent or improper conduct with other persons, either before or after the promise, is admissible.³ And evidence that when the relation commenced the woman was another man's mistress is admissible in mitigation of damages.⁴ But not that since the commencement of the action the plaintiff has made declarations to the effect that she had no affection for defendant, and would not think of marrying him but for his property;⁵ or that he had withdrawn his affections prior to the breach;⁶ or that he had offered to marry her since the trial commenced;⁷ or that her brother kept a bawdy-house;⁸ or that as there was no affection, there would have been no happiness in the marriage;⁹ or that the plaintiff was under a previous contract to marry some one else.¹⁰

¹ *Kniffen v. McConnell*, 30 N. Y. 285; *Southard v. Rexford*, 6 Cow. 260; *Reed v. Clark*, 47 Cal. 194; *Thom v. Knapp*, 42 N. Y. 474; 1 Am. Rep. 561; *White v. Thomas*, 12 Ohio St. 312; 80 Am. Dec. 347; *Hayward v. Saucer*, 84 Ind. 10; *Kelley v. Highfield*, 15 Or. 277; *contra*, *Hunter v. Hatfield*, 68 Ind. 416.

² *White v. Thomas*, 12 Ohio St. 312; 80 Am. Dec. 347.

³ *Johnson v. Caulkins*, 1 Johns. Cas. 116; 1 Am. Dec. 102; *Willard v. Stone*, 7 Cow. 22; 17 Am. Dec. 496; *Palmer v. Andrews*, 7 Wend. 142; *Button v. McCauley*, 5 Abb. Pr., N. S., 32; *Kniffen v. McConnell*, 30 N. Y. 285; *Green v. Spencer*, 3 Mo. 318; 26 Am. Dec. 672; *Cole v. Holliday*, 4 Mo. App.

94; *Fidler v. McKinley*, 21 Ill. 308; *McKee v. Nelson*, 4 Cow. 385; 15 Am. Dec. 384. But not if he is responsible for her character, as where he himself seduced her: *Boynton v. Kellogg*, 3 Mass. 189; 3 Am. Dec. 122.

⁴ *Dupont v. McAdow*, 6 Mont. 226.

⁵ *Miller v. Hayes*, 34 Iowa, 496; 11 Am. Rep. 154.

⁶ *Richmond v. Roberts*, 98 Ill. 473.

⁷ *Bennett v. Beam*, 42 Mich. 346; 36 Am. Rep. 442; *Kelly v. Renfro*, 9 Ala. 325; 44 Am. Dec. 441.

⁸ *Sherman v. Rawson*, 102 Mass. 395.

⁹ *Piper v. Kingsbury*, 48 Vt. 480.

¹⁰ *Roper v. Clay*, 18 Mo. 383; 59 Am. Dec. 314.

CHAPTER XL.

THE MARRIAGE CONTRACT.

- § 702. Marriage defined — Nature of the contract.
- § 703. Capacity of parties — In general.
- § 704. Consanguinity and affinity.
- § 705. Race, color, rank, religion.
- § 706. Physical incapacity.
- § 707. Mental incapacity.
- § 708. Infancy.
- § 709. Previous marriage undissolved.
- § 710. Force, fraud, duress, mistake.
- § 711. The marriage ceremony — At common law.
- § 712. By statute — Statutory formalities.
- § 713. Consent of parents or guardians.

§ 702. Marriage Defined — Nature of the Contract. — Marriage is defined as the act by which a man and woman unite for life with the intent of forming the relation of husband and wife. It is something more than an ordinary civil contract, being “an institution of society founded upon the consent and contract of the parties.”¹

§ 703. Capacity of Parties — In General. — To make a valid marriage, it is essential that the parties be under no disqualification. What are causes of disqualification are considered in the succeeding sections. Canonical disabilities as regards marriage are such as render the marriage voidable, and not void. They require a judgment of a court during the lives of the parties to make them effective as causes of divorce. Civil disabilities, arising from want of capacity to contract, or physical infirmity, avoid the marriage *ipso facto* without the action of a court.²

§ 704. Consanguinity and Affinity. — Consanguinity — that is, relationship by blood — is a legal impediment, and

¹ Story on Conflict of Laws, 108; ² Harrison v. State, 22 Md. 468; 85 Roche v. Washington, 19 Ind. 53; 81 Am. Dec. 658.
Am. Dec. 376.

this applies to marriages between blood relations in the lineal or ascending and descending lines.¹ Affinity — that is, the relationship that arises between a husband and his wife's relatives, or a wife and her husband's relatives — is not as a rule an impediment in the United States. This, unlike consanguinity, is a relation which ceases with the dissolution of the marriage which created it. Thus — though the law is different in England — it has been held in this country that a man may lawfully marry his deceased wife's sister.² By statute, however, in several states, a man may not marry his father's widow, nor his wife's daughter, nor his son's widow, nor his wife's mother, nor his grandson's widow, nor *vice versa* in the case of a woman. In Virginia and West Virginia a man cannot marry his wife's step-daughter, nor a woman her husband's step-son, or her niece's husband.³

§ 705. **Race, Color, Rank, Religion.** — Race, color, social rank, or religion are not impediments at common law, though formerly, in England, religion was, and in most of the southern states, by local statutes, color and race are.⁴

§ 706. **Physical Incapacity.** — To be legally qualified for marriage, the party must have a physical capacity to perform the sexual act. Mere barrenness or incapacity to conceive is not an impediment.⁵ Deaf, dumb, or blind persons are not for those reasons incapable of marrying.⁶

¹ In South Carolina, in the absence of a prohibitory statute, the court refused to declare void a marriage between uncle and niece: *Bowers v. Bowers*, 10 Rich. Eq. 551; 73 Am. Dec. 99.

² *Blodget v. Brinsmaid*, 9 Vt. 27.

³ 1 Stimson's Statute Law, 666.

⁴ 1 Stimson's Statute Law, 668; *Barkshire v. State*, 7 Ind. 389; 65 Am. Dec. 739; *State v. Gibson*, 36 Ind. 389; 10 Am. Rep. 42; *State v. Ross*, 76 N. C. 242; 22 Am. Rep. 678; *State v. Kennedy*, 76 N. C. 251; 22 Am. Rep. 683; *Green v. State*, 58 Ala. 190; 29

Am. Rep. 739. In some of the Western states a Caucasian may not marry a Chinese or Mongolian; marriages between whites and Indians are not inhibited: *Wells v. Thompson*, 13 Ala. 793; 48 Am. Dec. 76.

⁵ *Schouler on Domestic Relations*, sec. 19; *Devanbigh v. Devanbigh*, 5 Paige, 554; 28 Am. Dec. 443; see note in this case in 28 Am. Dec. 447-451; *J. G. v. H. G.*, 33 Md. 401; 3 Am. Rep. 183.

⁶ *Schouler on Domestic Relations*, sec. 18.

The provision of the New York statutes for a reference in an action to annul a marriage for "physical incapacity" of one of the parties does not include cases of incapacity resulting from sickness.¹

§ 707. **Mental Incapacity.**—As in the case of other contracts, one cannot enter into a valid marriage unless capable of giving an intelligent consent. Therefore an idiot, a lunatic, and one without understanding is disqualified;² so of one so drunk as not to know what he is doing.³ The same degree of mind which will enable a party to make a valid deed or will will be sufficient to enable him to contract matrimony.⁴ The question is, whether the person had sufficient mental capacity to make the contract of marriage. Evidence of his mental condition through life before and after the marriage is admissible.⁵ Although a marriage of a lunatic duly solemnized and followed by cohabitation may be set aside by means of a proper suit, it is not void if no proceedings are taken. On his death the wife becomes entitled to the rights of a widow.⁶ The question of the party's sanity cannot be raised in a collateral proceeding.⁷

§ 708. **Infancy.**—At common law, the age of consent is fourteen for males, and twelve for females. In this country, by statute, this limit has been raised somewhat, varying from fourteen to eighteen for males, and twelve to sixteen for females. Where a man marries a girl be-

¹ Morrell v. Morrell, 17 Hun, 324.

² Schouler on Domestic Relations, sec. 18; Cole v. Cole, 5 Sneed, 57; 70 Am. Dec. 275; True v. Ranney, 21 N. H. 52; 53 Am. Dec. 164; Reese v. Kincade, 2 Ired. Eq. 470; Foster v. Means, 1 Speers Eq. 569; 42 Am. Dec. 332; Rawdon v. Rawdon, 23 Ala. 565; Waymire v. Jetmore, 22 Ohio St. 271; Christy v. Clarke, 45 Barb. 529; Crump v. Morgan, 3 Ired. Eq. 91; 40 Am. Dec. 447; Jenkins v. Jenkins, 2 Dana, 103; 26 Am. Dec. 437; Wightman v. Wight-

man, 4 Johns. Ch. 343; Clement v. Mattison, 3 Rich. 93. The insane person, on recovering his reason, may affirm the marriage, and no new ceremony is necessary: Cole v. Cole, 5 Sneed, 57; 70 Am. Dec. 275.

³ Schouler on Domestic Relations, sec. 18.

⁴ Atkinson v. Medford, 46 Me. 510.

⁵ St. George v. Biddeford, 76 Me. 593.

⁶ Wiser v. Lockwood, 42 Vt. 720.

⁷ State v. Setzer, 97 N. C. 252; 2 Am. St. Rep. 290.

low the age of consent, the marriage is not void, unless they separate by mutual consent before she reaches that age, or unless she refuses to continue the cohabitation after reaching that age.¹

§ 709. **Previous Marriage Undissolved.**—Where one of the parties has been previously married, and the first marriage has not been dissolved, the second marriage is void. It is essential, however, that the first marriage shall have been valid in all respects.² A marriage solemnized on the day before the entry of a decree absolute, on a decree *nisi* in favor of one of the parties, is void.³ A divorce on the ground that the libelee, at the time of the marriage, had another wife living may be granted on evidence consisting of the libelee's admissions.⁴ Where one party is absent without being heard from for the space of seven years, there is a presumption at law that he or she is dead, and the other may marry again without being liable to a prosecution for bigamy.⁵ But if the former spouse returns, it avoids the second marriage.⁶ A man who innocently contracts a marriage with a woman who is the wife of another, believing her to be unmarried, may, by judicial decree, have the marriage declared void. But where a man marries a woman whom he knows to be the wife of another, the courts will not relieve him from the consequences of his act. Hence a petition for relief, in such a case, should aver the petitioner's ignorance of the first marriage at the time of his contracting the one from which he seeks to be freed.⁷

¹ *People v. Slack*, 15 Mich. 193; *Koonce v. Wallace*, 7 Jones, 194.

² *Patterson v. Gaines*, 6 How. 550; *Martin v. Martin*, 22 Ala. 86; *Harrison v. Lincoln*, 48 Me. 205; *Heffner v. Heffner*, 23 Pa. St. 104; *Sellers v. Davis*, 4 Yerg. 503; *Gathings v. Williams*, 5 Ired. 487; 44 Am. Dec. 49; *Glass v. Glass*, 114 Mass. 563; *Drummond v. Irish*, 52 Iowa, 41; *Webster v. Webster*, 58 N. H. 3; *Cartwright v.*

McGown, 121 Ill. 388; 2 Am. St. Rep. 105.

³ *Cook v. Cook*, 144 Mass. 163.

⁴ *Lindsay v. Lindsay*, 42 N. J. Eq. 150.

⁵ *Lawson on Presumptive Evidence*; *Hiram v. Pierce*, 45 Me. 367; 71 Am. Dec. 555.

⁶ *Glass v. Glass*, 114 Mass. 563; but see *Strode v. Strode*, 3 Bush, 227; 96 Am. Dec. 211.

⁷ *Tefft v. Tefft*, 35 Ind. 44.

By statute, in some of the states, on the granting of a divorce, the guilty party is prohibited from marrying for a term.¹ Where, without leave of court, a guilty party in a case of divorce marries again during the life of the other party, and afterwards obtains such leave, a continued cohabitation in the belief that the marriage already solemnized is or has become legal does not render it so.² A party procuring a marriage between himself and another by fraudulent representations, when by law he was not competent to enter into the marriage contract, as where he had a wife living from whom he was not lawfully divorced, is liable in damages; and an action is maintainable therefor without first procuring a formal annulment of the marriage contract.³

ILLUSTRATIONS. — H., having a wife still living, married B., who, while H. was still living and without any proceeding to nullify her marriage with H., married S. *Held*, that B. was the lawful wife of S.: *Shaak's Estate*, 4 Brewst. 305; 3 Pitts. Rep. 275. A decree of divorce in A's favor was entered at two o'clock, P. M., of the day upon which, at eleven o'clock, A. M., A, in good faith, supposing the decree to have been entered, married again. *Held*, a valid marriage: *Merriam v. Wolcott*, 61 How. Pr. 377. A man married, first A, then C, and then D. A was living when he married C, but not when he married D. D, on first hearing of C,—neither C nor D knew of A,—left the man, and after eleven years, during which time she heard nothing more of him, married E. *Held*, that this last marriage was invalid, and that in its favor no presumption would be made: *Randlett v. Rice*, 141 Mass. 385. A was divorced from his wife in New York because of his adultery, but was forbidden to marry again during her life. He then went to New Jersey, where he married again, and subsequently returned to New York. The statute in force in New Jersey at the time of his marriage provided that "all marriages where either of the parties shall have a former husband or wife living at the time of the marriage shall be invalid." *Held*, that A had no wife living within the meaning of the statute: *Moore v. Hegeman*, 27 Hun, 68. A party prohibited by a decree of

¹ 1 Bishop on Marriage and Divorce, 304; *West Cambridge v. Lexington*, 1 Pick. 505; 11 Am. Dec. 231; *White v. White*, 105 Mass. 325; 7 Am. Rep. 526.

² *Thompson v. Thompson*, 114 Mass. 566.

³ *Blossom v. Barrett*, 37 N. Y. 434; 97 Am. Dec. 747.

divorce, rendered in New York, from remarrying during the other party's life, went into another state, for the purpose of evading the decree, and there married a resident of New York during the life of the other party. *Held*, a valid marriage, and the prohibited party may maintain an action of absolute divorce for the adultery of the other party to the second marriage: *Thorp v. Thorp*, 90 N. Y. 602; 43 Am. Rep. 189.

§ 710. **Force, Fraud, Duress, Mistake.**—A marriage procured by force or fraud or duress is voidable;¹ so where it is solemnized without the consent of the parties.² But such marriages are not absolutely void; and if not set aside at the instance of the party defrauded in his or her lifetime, they will stand.³ Fraudulent representations as to a party's birth, social position, wealth, health, or even chastity, cannot be set up by the other to vitiate the contract of marriage.⁴ Where a man married a woman

¹ *Willard v. Willard*, 6 Bart. 297; 32 Am. Rep. 529; *Lyndon v. Lyndon*, 69 Ill. 43; *Bassett v. Bassett*, 9 Bush, 696; *Ferlat v. Gojon*, Hopk. Ch. 478; 14 Am. Dec. 554. The force and coercion necessary to invalidate a marriage must amount to *duress per minas*. Mere unwillingness on the part of one of the parties is not sufficient: *Stevenson v. Stevenson*, 7 Phila. 386. That the marriage was entered into for the purpose of defrauding the rights of others in property is no ground for setting it aside: *McKinney v. Clarke*, 2 Swan, 321; 58 Am. Dec. 59.

² *Mountholly v. Andover*, 11 Vt. 226; 34 Am. Dec. 685.

³ *Toppert v. Toppert*, 13 Bush, 326; 26 Am. Rep. 197.

⁴ *Varney v. Varney*, 52 Wis. 126; 38 Am. Rep. 726; *Reynolds v. Reynolds*, 3 Allen, 605; the court saying: "While, however, marriage by our law is regarded as a purely civil contract, which may well be avoided and set aside on the ground of fraud, it is not to be supposed that every error or mistake into which a person may fall concerning the character or qualities of a wife or husband, although occasioned by disingenuous or even false statements or practices, will afford sufficient reason for annulling an executed contract of marriage. In the absence

of force or duress, and where there is no mistake as to the identity of the person, any error or misapprehension as to personal traits or attributes, or concerning the position or circumstances in life, of a party, is deemed wholly immaterial, and furnishes no good cause for divorce. Therefore, no misconception as to the character, fortune, health, or temper, however brought about, will support an allegation of fraud on which a dissolution of the marriage contract, when once executed, can be obtained in a court of justice. These are accidental qualities, which do not constitute the essential and material elements on which the marriage relation rests. The law, in the exercise of a wise and sound policy, seeks to render the contract of marriage, when once executed, as far as possible indissoluble. The great object of marriage in a civilized and Christian community is to secure the existence and permanence of the family relation, and to insure the legitimacy of offspring. It would tend to defeat this object if error or disappointment in personal qualities or character was allowed to be the basis of proceedings on which to found a dissolution of the marriage tie. The law therefore wisely requires that persons who act on representa-

whom he thought was a widow with one child, but it turned out that she had never been married, and the child was illegitimate, this was held to be no ground for setting the marriage aside;¹ so where a man concealed the fact that he had served a term in the penitentiary.² But where a woman at the time of the marriage is pregnant by another man, unknown to the husband, this is a good ground for setting it aside at his instance.³ *Aliter*, however, where the husband has had, before marriage, connection with the woman, though she is pregnant by another man,⁴ or had knowledge of her condition before the marriage.⁵ Where a person under arrest for seduction or bastardy marries the woman to save himself from prosecution, this is not a ground for setting aside the marriage.⁶ A marriage entered into by mistake is not binding; as where the parties went through the ceremony in jest, and not intending to marry, though before an officer authorized to perform the ceremony.⁷

ILLUSTRATIONS.—A man induced a girl of fifteen to marry him, falsely representing that her parents consented. The marriage was not followed by cohabitation, the girl returning to her

tions or belief in regard to such matters should bear the consequences which flow from contracts into which they have voluntarily entered, after they have been executed, and affords no relief for the results of a 'blind credulity, however it may have been produced': *Ewing v. Wheatley*, 2 Hagg. Const. 175-183; *Wakefield v. Mackay*, 1 Phillim. 134, 137, note; 1 *Fraser on Domestic Relations*, 230; *Bishop on Marriage and Divorce*, secs. 100, 101." That the woman was too ready to marry from mercenary motives will not debar her nor the child of the marriage from relief based on fraudulent representations made to her to induce her to contract such marriage: *Piper v. Hoard*, 107 N. Y. 73; 1 Am. St. Rep. 789.

¹ *Farr v. Farr*, 2 McAr. 35.

² *Weir v. Still*, 31 Iowa, 107.

³ *Morris v. Morris*, Wright, 630; *Ritter v. Ritter*, 5 Blackf. 84; *Baker v. Ba-*

ker, 13 Cal. 87; *Reynolds v. Reynolds*, 3 Allen, 606; *Donovan v. Donovan*, 9 Allen, 140; *Carris v. Carris*, 24 N. J. Eq. 516; *Allen's Appeal*, 99 Pa. St. 196; 44 Am. Rep. 101. *Contra*, *Scroggins v. Scroggins*, 3 Dev. 535; *Long v. Long*, 77 N. C. 304; 24 Am. Rep. 449; *Varney v. Varney*, 52 Wis. 120; 38 Am. Rep. 726.

⁴ *Foss v. Foss*, 12 Allen, 26; *Crehore v. Crehore*, 97 Mass. 330; 93 Am. Dec. 98; *Hoffman v. Hoffman*, 30 Pa. St. 417; *States v. States*, 37 N. J. Eq. 195; *Seilheimer v. Seilheimer*, 40 N. J. Eq. 412. *Contra*, *Scott v. Schufeldt*, 5 Paige, 43.

⁵ *Crehore v. Crehore*, 97 Mass. 330; 93 Am. Dec. 98.

⁶ *Jackson v. Winne*, 7 Wend. 47; 22 Am. Dec. 563; *Sickles v. Carson*, 26 N. J. Eq. 440. And see *Honnett v. Honnett*, 33 Ark. 156; 34 Am. Rep. 39.

⁷ *McClurg v. Terry*, 21 N. J. Eq. 225.

parents. *Held*, that it should be declared void: *Moot v. Moot*, 37 Hun, 288. The complainant was at the time of the marriage a school-girl about fifteen years old; defendant, her father's coachman, while driving the children out, inveigled the complainant to the marriage; he procured the license through perjury, by swearing that the complainant was of age; and she never consummated the marriage by cohabitation, but immediately repudiated it. *Held*, that the marriage under such circumstances ought to be declared void: *Lyndon v. Lyndon*, 69 Ill. 43. One who had seduced a woman was told by a brother-in-law that if he did not marry her he would never marry another woman, and that the community would lynch him; but there was no restraint nor threat of present bodily harm from those present. Having married the woman in consequence of these representations, *held*, that he could not avoid the marriage for duress: *Honnett v. Honnett*, 33 Ark. 156; 34 Am. Rep. 39. A was arrested on a charge of seducing a woman, who was alleged to be a minor. The woman was, as A knew, a common prostitute, with whom he had had criminal intercourse. The magistrate demanded excessive bail, and a minister and a constable who made the arrest, as well as the magistrate, urged a marriage. A consented thereto. *Held*, that neither the facts above recited, nor the additional fact that the woman was not a minor, afforded cause for divorce on the ground that the marriage had been induced by fraud or menace: *Seyer v. Seyer*, 37 N. J. Eq. 210. A boy of eighteen is frightened by a justice into marrying a woman who has instituted bastardy proceedings against him. *Held*, that the marriage would be annulled: *Smith v. Smith*, 51 Mich. 607. A designing and unchaste woman, in middle age, knowing that an old man, who is deaf, and living in seclusion, is a firm believer in spiritualism, pretends to be a medium, and to receive communications from spirits commanding that they marry, and that he convey to her valuable property, claims to be a clairvoyant physician, and able to cure his deafness, and by other fraudulent devices induces him to marry her and to convey to her the property. *Held*, that the marriage and conveyance will be set aside as procured by fraud and undue influence: *Hides v. Hides*, 65 How. Pr. 17. The husband had before marrying his present wife, who now sued for a divorce, represented to her that his former wife was deceased, whereas she was living, he having been divorced from her. *Held*, that these representations, even if fraudulent, and though the plaintiff would not have married him if she had known the truth, furnished no reason for granting her a decree declaring the marriage null: *Clarke v. Clarke*, 11 Abb. Pr. 228. A man was arrested on a complaint for giving drugs to procure an abortion on a woman with whom he had had illicit intercourse. While

under arrest he went with her to the magistrate, who told him that he must marry her, or give bail, or go to jail, whereupon, being unable to procure bail, he married her. *Held*, that the marriage would not be annulled on the ground of duress: *Frost v. Frost*, 42 N. J. Eq. 55.

§ 711. The Marriage Ceremony—At Common Law.—

At common law, to constitute marriage, no particular solemnities or forms were necessary. Mutual consent to enter into the relation of husband and wife was all that was essential.¹ Such informal marriages have been recognized in the United States.² Thus it has been held in a number of cases in this country that a contract to marry *per verba de futuro*, followed by cohabitation, is a valid marriage at common law.³ The mutual present assent to immediate marriage by persons capable of assuming that relation is sufficient to constitute marriage at common law; but generally the legislature has full power, not to prohibit, but to prescribe reasonable regulations relating to marriage, and prescribe penalties against those who solemnize or contract marriages contrary to statutory command.⁴ Evidence of consent and agreement to become man and wife, and of their cohabiting together,

¹ *Meister v. Moore*, 96 U. S. 76; *Cartwright v. McGown*, 121 Ill. 388; 2 Am. St. Rep. 105.

² *Meister v. Moore*, 96 U. S. 76; *Hutchins v. Kimmell*, 31 Mich. 126; 18 Am. Rep. 164; *Dyer v. Brannock*, 66 Mo. 391; 27 Am. Rep. 359; *Askew v. Dupree*, 30 Ga. 173; *Dickerson v. Brown*, 49 Miss. 357; *Port v. Port*, 70 Ill. 484; *Lewis v. Ames*, 44 Tex. 319; *Campbell v. Gullatt*, 43 Ala. 57; *Hynes v. McDermott*, 82 N. Y. 41; 37 Am. Rep. 538; 91 N. Y. 451; 43 Am. Rep. 677; *Davis v. Davis*, 7 Daly, 308; *Titcomb's Estate*, Myrick's Prob. 55; *Mathewson v. Phoenix Co.*, 20 Fed. Rep. 281; *Commonwealth v. Stump*, 53 Pa. St. 132; 91 Am. Dec. 198. A marriage may be proved by cohabitation as man and wife, reputation, etc., in all cases, except in cases of bigamy and criminal conversation: *Case v. Case*, 17 Cal. 598; *Taylor v. Robinson*, 29 Me. 323; *Commonwealth v. Little-*

john, 15 Mass. 163; *State v. Winkley*, 14 N. H. 480; *Fenton v. Reed*, 4 Johns. 52; 4 Am. Dec. 244; *People v. McCormack*, 4 Park. Cr. 9; *Weaver v. Cryer*, 1 Dev. 337; *Taylor v. Shemwell*, 4 B. Mon. 575; *Northfield v. Vershire*, 33 Vt. 110; *Ford v. Ford*, 4 Ala. 142.

³ *Port v. Port*, 70 Ill. 486; *In re McCausland*, 52 Cal. 568; *Askew v. Dupree*, 30 Ga. 173; *Dyer v. Brannock*, 66 Mo. 391; 27 Am. Rep. 359; note to *Cheney v. Arnold*, 69 Am. Dec. 609; *Newbury v. Brunswick*, 2 Vt. 151; 19 Am. Dec. 703; *Fenton v. Reed*, 4 Johns. 52; 4 Am. Dec. 244; *Chamberlain v. Chamberlain*, 71 N. Y. 423; *Commonwealth v. Stump*, 53 Pa. St. 132; 91 Am. Dec. 198; *contra*, *Cheney v. Arnold*, 15 N. Y. 345; 69 Am. Dec. 609; *Duncan v. Duncan*, 10 Ohio St. 181.

⁴ *State v. Walker*, 36 Kan. 297; 59 Am. Rep. 556.

is sufficient proof of marriage to legitimize the issue.¹ Circumstances of cohabitation, acknowledgment, reputation, and recognition by the family form a presumption that a connection was matrimonial, not meretricious.² But a marriage will not be presumed even where, for convenience, the parties hold themselves out as man and wife before third persons, provided their cohabitation has the elements of a purely meretricious relation.³ Betrothal alone, followed by cohabitation, but without a present agreement to become husband and wife, does not constitute a valid marriage.⁴ An offer to prove that a man and woman lived together as husband and wife is not an offer to prove their marriage.⁵ At common law, the fact of sexual intercourse after an agreement to marry at a future day does not constitute marriage. The copula must have been in fulfillment of the agreement to marry.⁶ Where the beginning of a cohabitation is illicit, there can be no presumption of marriage from the cohabitation and reputation.⁷ General reputation in regard to marriage may be proved by the testimony of a witness speaking from his own knowledge of the existence of such general reputation, except in cases of adultery or bigamy, in which strict proof is required. And such evidence is also admissible in disproof of marriage. It is admissible as a fact to show whether or not a marriage exists.⁸ It has been held that a marriage may be proved by presumption from evidence of repute and cohabitation, even against a subsequent ceremonial marriage.⁹ It cannot be

¹ *Cheseldine v. Brewer*, 1 Har. & M. 152; *Boone v. Purnell*, 28 Md. 607; 92 Am. Dec. 713; *Ferrie v. Public Administrator*, 4 Bradf. 28; *Jackson v. Rhem*, 6 Jones Eq. 141.

² *In re Christie*, 1 Tuck. 81.

³ *In re Howe*, Myrick's Prob. 100.

⁴ *Peck v. Peck*, 12 R. I. 485; 34 Am. Rep. 702.

⁵ *Kelly v. Murphy*, 70 Cal. 560.

⁶ *Stoltz v. Doering*, 112 Ill. 234.

⁷ *Reading Ins. etc. Co.'s Appeal*, 113 Pa. St. 204; 57 Am. Rep. 448.

⁸ *Boone v. Purnell*, 28 Md. 607; 92 Am. Dec. 713.

⁹ *Brower v. Bowers*, 1 Abb. App. 214; *Camden v. Belgrade*, 75 Me. 128; 46 Am. Rep. 364. But in Maryland it is ruled that a presumptive marriage between A and B is overcome by proof of a subsequent actual marriage between A and C: *Jones v. Jones*, 48 Md. 391; 30 Am. Rep. 466.

shown by general reputation that no marriage existed.¹ A formal marriage being proved, evidence that the cohabitation was reputed to be unlawful is incompetent.²

ILLUSTRATIONS.—A man and woman claim to have been married at a particular time and place; they cohabited and kept house together as man and wife for ten years; two children were born of their connection. *Held*, that a marriage in fact existed, even though the ceremonial marriage as claimed might have been disproved: *Tummalty v. Tummalty*, 3 Bradf. 369; *Grotgen v. Grotgen*, 3 Bradf. 373. A man and woman being engaged to be married, the former stated to the latter that he did not believe in marriage ceremonies, and wished her to waive the ceremony, saying that a marriage without it would be perfectly valid. She finally consented to waive the ceremony, and fixed a day for the marriage. On that day, while they were riding together in a carriage, he placed a ring upon her finger, saying, "This is your wedding-ring; we are married." She received the ring as a wedding-ring. He then said: "We are married. I will live with you and take care of you all the days of my life, as my wife." She assented to this, and they went to a house where he had previously engaged board for himself and wife, where they lived together as man and wife for about five weeks, he treating her as his wife, and addressing and speaking of her as such. *Held*, in her action for a divorce, that this was a valid marriage: *Bissell v. Bissell*, 55 Barb. 325; 7 Abb. Pr., N. S., 16. Defendant and M. lived together as husband and wife for nearly forty years. They addressed each other as husband and wife; she bore his name; land was conveyed to her as his wife, and she made a will describing herself as his wife. In an action by a devisee of M. to recover possession of premises claimed by defendant as tenant by courtesy, defendant testified: "By mutual consent we lived as man and wife"; and again: "The marriage ceremony was never performed only by mutual consent"; "I promised to marry her." *Held*, that these facts were evidence of a valid marriage, not only as to third persons, but as between M. and defendant: *Richard v. Brehm*, 73 Pa. St. 140; 13 Am. Rep. 733. Continuous matrimonial intercourse for thirty-four years was shown between a man and woman, under an assumed name. The man also lived as a bachelor in another locality, among his relatives and friends, who did not know of the cohabitation. *Held*, 1. That evidence that he was reputed to be a bachelor was incompetent; 2. That a letter written by the man, and signed by the woman,

¹ *Bartlett v. Musliner*, 28 Hun, 235.

² *Northrop v. Knowles*, 52 Conn. 522; 52 Am. Rep. 613.

in the assumed matrimonial name, expressed in the plural sense, and congratulating her nephew on his marriage, was competent to prove the marriage: *Badger v. Badger*, 88 N. Y. 546; 42 Am. Rep. 263. Decedent, whose family relationship was in issue, had just before his death been found traveling in company with a woman and certain young children, toward whom these adults were observed to perform the office of parents; the baggage inferentially shown to belong to deceased containing wearing apparel apparently suitable to all the party in common. *Held*, that these circumstances afforded an inference that the relation of husband and wife existed: *Kansas Pac. R. R. Co. v. Miller*, 2 Col. T. 442. Defendant being on trial for murder, a woman was offered as a witness for the state, who on her *voir dire* stated that she and the defendant agreed to marry; that defendant told her that he could not get a license for them to marry at that time, because "all the old licenses had run out," but that "as soon as the new licenses came in" he would get a license, and upon this they cohabited. *Held*, no marriage: *Robertson v. State*, 42 Ala. 509. Parties went before a justice, and taking each other by the right hand, in the presence of witnesses, voluntarily declared, with the usual mutual covenants, that they took each other for husband and wife, and then called on a justice to make a record of the proceedings, which he did. *Held*, that there was no legal marriage: *Mangue v. Mangue*, 1 Mass. 240. A woman, claiming to be the widow of one deceased, admitted that no actual marriage ever took place, but rested her claim upon a declaration of the deceased, made to her in the absence of witnesses, that he would claim her as his wife, and would take care of her and the children. *Held*, that her testimony established the fact that there had been no marriage, and that, therefore, evidence of reputation and cohabitation were inadmissible for the purpose of proving a marriage: *In re Tholey*, 93 Pa. St. 36.

§ 712. **By Statute.** — By Lord Hardwicke's act, passed in England in George II.'s time, all marriages were required to be celebrated in a church with previous publication of banns, and marriages not so celebrated were, with some few exceptions, declared void. This legislation has been followed in most, if not all, of the states. Under these statutes, the ceremony must be celebrated before either a clergyman, a judge, justice of the peace, or some other officer upon which the power is expressly conferred; and as a preliminary, a license issued by the

proper authority must first be had.¹ As to marriages which may take place without these statutory requisites, it has been recently laid down by our highest tribunal that although a statute requires all marriages to be entered into in the presence of a minister, a magistrate, or other officer, or be preceded by a license, or by the publication of banns, or be attested by witnesses, or the like, these provisions are merely directory, which may subject the principals or all parties to prosecution, yet marriages according to the common law, and without observing the statute regulations, are nevertheless valid marriages. It is otherwise, of course, where the statute declares that no marriage shall be valid unless entered into according to the prescribed forms.² For the non-observance of the statute formalities the marriage is not void; as, for example, for not procuring a license.³ Where a marriage appears to have been solemnized by a competent officer, the marriage is deemed lawful, although the officer for his irregularity may have incurred a penalty.⁴ A clergyman in the celebration of a marriage is a public civil officer, and his acts in that capacity are admissible as *prima facie* evidence of his official character.⁵ The words "I take you to be my wife," uttered by the man, and the woman's reply, "To be sure he is my husband, good enough," referring to an illegal cohabitation with him, are not sufficient.⁶

§ 713. **Consent of Parents or Guardians.**—In the case of infants, the consent of parents or guardians is usually

¹ In New Jersey, a justice of the peace may solemnize a marriage out of the county for which he was commissioned: *Pearson v. Howey*, 11 N. J. L. 12.

² *Meister v. Moore*, 96 U. S. 76; *Londonderry v. Chester*, 2 N. H. 268; 9 Am. Dec. 61; *Hargroves v. Thompson*, 31 Miss. 211; see *Ligonia v. Buxton*, 2 Me. 102; 11 Am. Dec. 46; *Beverlin v. Beverlin*, 29 W. Va. 732.

³ *Holmes v. Holmes*, 6 La. 463; 26 Am. Dec. 482; *Askew v. Dupree*, 30

Ga. 173; *White v. State*, 4 Iowa, 449; *Cartwright v. McGown*, 121 Ill. 388; 2 Am. St. Rep. 106.

⁴ *Milford v. Worcester*, 7 Mass. 48.

⁵ *Goshen v. Stonington*, 4 Conn. 209; 10 Am. Dec. 121; *United States v. Lambert*, 2 Cranch C. C. 137; *Scherpf v. Szadeczky*, 4 E. D. Smith, 110; 1 Abb. Fr. 366; *Pettyjohn v. Pettyjohn*, 1 Houst. 332; *Damon's Case*, 6 Me. 148; *State v. Winkley*, 14 N. H. 480.

⁶ *Hantz v. Sealy*, 6 Binn. 405.

a statutory requisite; but generally the marriage is valid, the law contenting itself with punishing the officer who solemnizes a marriage of this kind in the absence of the parental consent.¹ The promise of an infant is valid (at his or her election) without the consent of the parent or guardian. This consent is essential only upon the solemnization of the marriage.²

¹ Schouler on Domestic Relations, Tates, 101 Ind. 129; 51 Am. Rep. 30; Hiram v. Pierce, 45 Me. 367; 71 742.
Am. Dec. 555; Hervey v. Moseley, 7 ² Cannon v. Alsbury, 1 A. K. Marsh. Gray, 479; 66 Am. Dec. 515; Tates v. 76; 10 Am. Dec. 709.

CHAPTER XLI.

RIGHTS, DUTIES, AND DISABILITIES OF HUSBAND AND WIFE.

§ 714. Effect of the marriage — Rights and duties of the husband.

§ 715. Rights and duties of the wife.

§ 716. Disabilities arising from marriage — Contracts and suits between husband and wife.

§ 717. Disqualification as witnesses.

§ 714. **Effect of the Marriage—Rights and Duties of the Husband.**—By the marriage, the husband becomes the head of the household which he establishes.¹ To this end he has the right to make or change his domicile as he pleases, and the wife is bound to go with him.² He is also entitled to the society of his wife, and may sue for damages any person enticing her away from him.³ And whenever a wife is not justifiable in abandoning her husband, he who knowingly and intentionally assists her in thus violating her duty is guilty of a wrong for which an action will lie.⁴ But a stranger in good faith acting upon a wife's complaint of her husband's ill usage may lawfully aid and shelter her. There is no presumption that the wife's complaints were unfounded.⁵ To entitle the plaintiff to a preliminary injunction in an action to restrain the defendant from harboring the plaintiff's wife, it must appear conclusively that the defendant has acted maliciously, and not from motives of humanity. Hence where, on such a motion, the defendant, who was the wife's father, denied any malice or improper influence over the wife, and the wife averred facts of personal violence from

¹ Schouler on Husband and Wife, secs. 53-58.

² Hair v. Hair, 10 Rich. Eq. 163. The domicile of the wife is that of the husband: Jenness v. Jenness, 24 Ind. 355; 87 Am. Dec. 335. *Aliter*, it seems, where the removal is not *bona fide*, but is unnecessary and malicious:

Boyce v. Boyce, 23 N. J. Eq. 337; Bishop v. Bishop, 30 Pa. St. 412.

³ Schouler on Husband and Wife, sec. 64; Bennett v. Smith, 21 Barb. 439; Hutcheson v. Peck, 5 Johns. 196.

⁴ Barnes v. Allen, 30 Barb. 663.

⁵ Barnes v. Allen, 1 Abb. App. 111.

her husband, the motion was denied.¹ The father of a married woman may be liable in damages to her husband for removing his daughter from the husband's house to his own, but not where he acts in good faith upon creditable complaints of the husband's ill treatment of his wife, even if such ill treatment is not established in fact. The intent with which the father acted is the material point.² A husband is justified in the use of such force as may be necessary to prevent another from taking his wife from him, but not if she goes of her own volition.³

The husband has also the right to regulate the household.⁴ At common law, the husband could in necessary cases inflict moderate corporal punishment upon the wife, but this right no longer exists in this country.⁵ He is obliged to support the wife.⁶ It is the duty of a husband to support his wife, whether she be sane or insane, and while he has the ability to do so, he cannot charge her estate with money used in that behalf.⁷

ILLUSTRATIONS.—An action was brought by a wife against her husband to recover the possession of her lands, of all which he had taken possession and control, and was cultivating solely for his own use, and damages for withholding the same. *Held*, that the action would lie. But the husband's marital right of occupancy cannot be impaired; his rights of ingress and egress to the dwelling and society of his wife continues; and a writ of possession following a judgment must be so framed as to put the wife in possession without putting the husband out: *Man-*

¹ *Campbell v. Carter*, 3 Daly, 165.

² *Smith v. Lyke*, 13 Hun, 204.

³ *State v. Weathers*, 98 N. C. 685.

⁴ *Schouler on Husband and Wife*, sec. 69.

⁵ *Schouler on Husband and Wife*, 68; *Com. v. McAfee*, 108 Mass. 458; 11 Am. Rep. 383; *State v. Oliver*, 70 N. C. 61; *Fulgham v. State*, 46 Ala. 143; *Poor v. Poor*, 8 N. H. 312; 29 Am. Dec. 644; *Knight v. Knight*, 31 Iowa, 489; *Shackett v. Shackett*, 49 Vt. 197; *Bascom v. Bascom*, Wright, 632; *Perry v. Perry*, 2 Paige, 503. Yet some American cases recognize the right "to use towards the wife (in the

government of his household) such a degree of force as is necessary to control an unruly temper and make her behave herself": *State v. Black*, 1 Winst. 266; 86 Am. Dec. 431; *Bradley v. State*, Walk. (Miss.) 156; *Richards v. Richards*, 1 Grant Cas. 392; *Joyner v. Joyner*, 6 Jones Eq. 326; 82 Am. Dec. 421; *State v. Rhodes*, Phill. (N.C.) 455; 98 Am. Dec. 78; *State v. Mabrey*, 64 N. C. 593.

⁶ *Miller v. Miller*, 1 N. J. Eq. 386; *Callahan v. Patterson*, 4 Tex. 61; 51 Am. Dec. 712.

⁷ *In re Meyer*, Myrick's Probate, 178.

ning v. Manning, 79 N. C. 293; 28 Am. Rep. 324. A wife, without the consent of her husband, and in his absence, left his house and went to live with her brother, taking with her money of the husband, which she applied to her own use. After his death, his administrator filed a bill against her to recover the money so taken and applied by her. *Held*, that the husband could not have recovered the same in his lifetime, and that his administrator could not: *McCormick v. McCormick*, 7 Leigh, 66.

§ 715. **Duties and Rights of Wife.** — It is the duty of the wife to live with the husband, to follow him wherever he establishes his home, to render family services in return for the husband's support.¹ It is a legal presumption that a wife's services and the comfort of her society are fully equivalent to any obligations which the law imposes on her husband because of the marital relation, and her obligation to render family services is co-extensive with that of her husband to support her in the family.² A court of equity has no jurisdiction to compel cohabitation between husband and wife, nor to restore conjugal rights which are withheld. The only subject-matter for its jurisdiction is the property and respective rights of the parties.³ A wife may maintain an action for the loss of the society and companionship of her husband, against one who wrongfully and maliciously induces and procures her husband to abandon or send her away.⁴ A widow is not a "legal heir" of her deceased husband.⁵ A wife is not a "relation" within the meaning of a statute which provides that "where a devise of real or personal estate is made to a child or other relation of the testator, and the devisee dies before the testator, leaving issue who survive the testator, such issue shall take the estate so devised in the same manner as the devisee would have done had he survived the testator."⁶

¹ Schouler on Husband and Wife, secs. 53-72.

² *Randall v. Randall*, 37 Mich. 563.

³ *Cruger v. Douglas*, 4 Edw. Ch. 433.

⁴ *Westlake v. Westlake*, 34 Ohio St. 621; 32 Am. Rep. 397.

⁵ *Lord v. Bourne*, 63 Me. 366; 18 Am. Rep. 234.

⁶ *Esty v. Clark*, 101 Mass. 36; 3 Am. Rep. 320; *Cleaver v. Cleaver*, 39 Wis. 96; 20 Am. Rep. 30.

§ 716. **Disabilities Arising from Marriage—Contracts, Suits, etc., between Husband and Wife.**—As a general rule, both at law and in equity, there can be no valid contract or agreement between husband and wife, they being considered in law as one person.¹ A deed from a husband directly to his wife is void at law.² He cannot convey land immediately to his wife, but he may convey it to trustees for her.³ But a wife may, in equity, contract with her husband as to her separate property;⁴ and she may be a party to a deed with her husband relating to her matrimonial rights.⁵ A husband may make gifts or presents to his wife, which will be supported in equity against himself and his representatives;⁶ he may give a promissory note to his wife for a valuable consideration;⁷ he may hold land in trust for his wife.⁸ In equity, a man may sue his wife, or a wife her husband.⁹ Under a statute providing that a married woman abandoned by her husband may “sue and be sued as a *feme sole*,” she may maintain a suit against her husband to procure the setting aside of a conveyance of land obtained by him from her by fraud, undue influence, and duress.¹⁰ The Wisconsin statute, providing that married women may sue and be sued as if unmarried, enables a husband to maintain replevin against his wife.¹¹ A wife is abandoned, in the sense that she may sue for her earnings, if her husband

¹ Leake on Contracts, 567; Beach v. Beach, 2 Hill, 260; 38 Am. Dec. 584; Van Order v. Van Order, 8 Hun, 316; Read v. Gannon, 3 Daly, 416. A contract between husband and wife, in which it is agreed that all matters of dispute and fault-finding shall cease, and that the wife shall keep the home in a comfortable condition, the husband to pay the expenses of the household and also a monthly allowance to the wife, is void: Miller v. Miller, Iowa, June, 1889.

² Shepard v. Shepard, 7 Johns. Ch. 57; 11 Am. Dec. 396.

³ Abbott v. Hurd, 7 Blackf. 510;

Martin v. Martin, 1 Me. 394; Frissell v. Rozier, 19 Mo. 448; Voorhees v. Presbyterian Church, 17 Barb. 103; Fowler v. Trebein, 16 Ohio St. 493; 91 Am. Dec. 95; Parker v. Stuckert, 2 Miles, 278.

⁴ Leake on Contracts, 567.

⁵ Leake on Contracts, 567.

⁶ Garner v. Garner, Busb. Eq. 1; 57 Am. Dec. 593.

⁷ Benedict v. Drigga, 34 Hun, 94.

⁸ Camp v. Smith, 98 Ind. 409.

⁹ Higgins v. Higgins, 14 Abb. N. C. 13.

¹⁰ Adams v. Adams, 51 Conn. 135.

¹¹ Carney v. Gleissner, 62 Wis. 493.

is confined in an asylum for insanity.¹ Contributory negligence will not bar the action of the wife, she being the injured party. His negligence cannot be imputed to her.²

ILLUSTRATIONS.—Under the Kansas statute, a married woman may sue as though unmarried. *Held*, that she may maintain an action in her own name against one depriving her of her husband's affections, society, care, and support: *Mehrhoff v. Mehrhoff*, 26 Fed. Rep. 13.

§ 717. **Disqualification as Witnesses.**—At common law, husband and wife could not testify as witnesses in courts of justice for or against each other.³ The rule, however, did not apply to parties living together, but not married, as, for example, a man and his mistress.⁴ And even when divorced they cannot testify against each other as to matters occurring during the marriage.⁵ But there were several exceptions to this common-law rule, viz., husband and wife could make criminal complaints against each other, and in the prosecution testify to personal injuries received.⁶ The rule that the wife shall not testify against the husband is founded upon their legal unity and the policy of preventing discord between them, and is not applicable to actions at law in which the husband and wife have conflicting interests and are opposing parties, as in divorce actions, suits by the wife seeking protection against the husband, or suits in equity relating to the wife's separate estate.⁷ Modern statutes, in force in perhaps all of the states, render husbands and their wives competent and compellable witnesses for

¹ *Harris v. Bohle*, 19 Mo. App. 529.

² *Flori v. St. Louis*, 3 Mo. App. 231.

³ 1 Greenl. Ev. 254.

⁴ 1 Greenl. Ev. 339.

⁵ *Dickerman v. Graves*, 6 Cush. 308; 53 Am. Dec. 43; *Reeves v. Herr*, 59 Ill. 83; *Rea v. Tucker*, 51 Ill. 110; 99 Am. Dec. 539.

⁶ *State v. Bennett*, 31 Iowa, 24; *State v. Boyd*, 2 Hill, 288; 27 Am. Dec. 376; *State v. Dyer*, 59 Me. 303;

Matthews v. State, 32 Tex. 117; *Goodrum v. State*, 60 Ga. 509; *Whipp v. State*, 34 Ohio St. 87; 32 Am. Rep. 359; *State v. Parrott*, 79 N. C. 615; *Commonwealth v. Reid*, 8 Phila. 385; *Commonwealth v. Murphy*, 4 Allen, 491. But see *State v. Hussey*, Busb. 126; *State v. Davidson*, 77 N. C. 522.

⁷ *Spitz's Appeal*, 56 Conn. 184; 7 Am. St. Rep. 303.

each other, except in criminal cases and in cases of adultery, but neither shall be compelled to disclose communications made during marriage.¹ A wife is not a competent witness to her husband's will,² nor to a will containing a devise to her husband.³

¹ *Farrell v. Ledwell*, 21 Wis. 182; *Peaslee v. McLoon*, 16 Gray, 488; *Metler v. Metler*, 18 N. J. Eq. 270; *Parsons v. People*, 21 Mich. 509; *State v. Straw*, 50 N. H. 460; *Stanley v. Stanton*, 36 Ind. 445; *Noble v. Withers*, 36 Ind. 193; *Craig v. Brendel*, 69 Pa. St. 153; *Newhouse v. Miller*, 35 Ind. 463; *Reeves v. Herr*, 59 Ill. 81; *Green v. Taylor*, 3 Hughes, 400; *Haerle v. Kreihn*, 65 Mo. 202; *State v. Brown*, 67 N. C. 470. A statute providing for the admission of interested parties as witnesses does not *per se* remove the disqualification of husband and wife: *Lucas v. Brooks*, 18 Wall. 436; *Gibson v. Commonwealth*, 87 Pa. St. 253; *Schultz v. State*, 32 Ohio St. 276; *Gee v. Scott*, 48 Tex. 510; 26 Am. Rep. 331.

² *Pease v. Allis*, 110 Mass. 157; 14 Am. Rep. 591.

³ *Sullivan v. Sullivan*, 106 Mass. 474; 8 Am. Rep. 356.

CHAPTER XLII.

LIABILITIES OF HUSBAND.

- § 718. Husband liable for wife's antenuptial debts.
- § 719. Power of wife as agent of husband to bind him.
- § 720. What are "necessaries," and what are not.
- § 721. Wife's authority during husband's absence.
- § 722. Husband may revoke authority.
- § 723. Wife's authority arising from necessity — Husband failing to provide.
- § 724. Desertion or expulsion of wife.
- § 725. When husband not liable — In general.
- § 726. Wife already supplied with allowance sufficient.
- § 727. Credit given to wife only.
- § 728. Ratification by husband of wife's contracts.
- § 729. Liability of husband for wife's torts.
- § 730. Injuries to wife — Husband's right of action

§ 718. **Husband Liable for Wife's Antenuptial Contracts and Debts.**—The husband is liable for engagements and debts made by the wife before the marriage;¹ but this liability exists only so long as the coverture lasts, and on the death of the wife, ceases.² Therefore, if it be not enforced during the wife's life, the creditor's remedy against the husband is gone.³ Where a woman who has been deserted by her husband is divorced and marries again, her second husband will be jointly liable with her for her contracts made while she was so deserted.⁴ If the wife survives the husband, she becomes again personally liable for her antenuptial debts.⁵ Real estate of a *feme covert* may be extended and set off on execution in satisfaction of a judgment against her and her husband on a

¹ *Lamb v. Belden*, 16 Ark. 539; *Cureton v. Moore*, 2 Jones Eq. 204; *Roach v. Quick*, 9 Wend. 238; *Butler v. Breck*, 7 Met. 164; 39 Am. Dec. 763; *Prescott v. Fisher*, 22 Ill. 390; *Alxander v. Morgan*, 31 Ohio St. 546; *Gruen v. Bamberger*, 11 Mo. App. 261; *Harrison v. Trader*, 27 Ark. 288; *Clawson v. Hutchinson*, 11 S. C. 323. Even though he is an infant: *Cole v. Seeley*, 25 Vt. 220; 60 Am. Dec. 258.

² *Cole v. Shurtleff*, 41 Vt. 311; 98 Am. Dec. 587.

³ 2 Kent's Com. 144.

⁴ *Prescott v. Fischer*, 22 Ill. 390.

⁵ *Woodman v. Chapman*, 1 Camp. 189.

contract made by her previous to her marriage.¹ By statute in several states the law in this respect is altered, and his liability is either abolished altogether, or the husband's property, except such as he acquires from the wife, is not liable for the wife's pre-nuptial debts.² The marriage extinguishes all debts between the parties to it.³

ILLUSTRATIONS. — A widow hired a house, and afterwards, during the term, remarried, continuing in the house, and receiving visits there from her husband, who, however, lived elsewhere. *Held*, that the husband was not liable for use and occupation: *Biery v. Ziegler*, 93 Pa. 367; 39 Am. Rep. 756. A gave to B, who afterwards became his wife, a deed for a piece of land for the alleged consideration of four hundred dollars, and after her decease he claimed to have the amount allowed against her separate estate. *Held*, that the debt became canceled by the marriage, and was therefore not a legal claim against the estate: *Burleigh v. Coffin*, 22 N. H. 118.

§ 719. **Power of Wife as Agent of Husband to Bind Latter.** — The cohabitation of husband and wife raises a presumptive authority in the wife to contract for her husband in all domestic matters ordinarily confided to the management of the wife; as, for the reasonable supply of goods for the use of her husband, herself, and household, according to the condition in which they live.⁴ This presumptive authority is restricted to such goods as are suitable in kind, sufficient in quantity, and necessary in fact.⁵ Employment by a wife living with her husband of a servant for ordinary domestic service in the family is within her implied authority.⁶ The authority extends to

¹ *Fox v. Hatch*, 14 Vt. 340; 39 Am. Dec. 226.

² *Missouri Laws*, 1881, p. 161; *Laws of Kentucky and New York*; *Roundtree v. Thomas*, 32 Tex. 286; *Shore v. Taylor*, 46 Ind. 345; *Travis v. Willis*, 55 Miss. 557; *Wood v. Orford*, 52 Cal. 412; *Cannon v. Grantham*, 45 Miss. 88; *Madden v. Gilmer*, 40 Ala. 637; *Bryan v. Doolittle*, 38 Ga. 255; *Smiley v. Smiley*, 18 Ohio St. 543; *Bailey v. Pearson*, 29 N. H. 77; *Reunnecker v. Scott*, 4 G. Greene, 185; *Callahan*

v. Patterson, 4 Tex. 61; 51 Am. Dec. 712; *Cuny v. Shrader*, 19 Ala. 831. But see *Connor v. Berry*, 46 Ill. 370; 95 Am. Dec. 417. A personal judgment cannot be rendered against the husband on a promissory note given by the wife before the marriage: *Wood v. Orford*, 52 Cal. 412.

³ *Burleigh v. Coffin*, 22 N. H. 118; 53 Am. Dec. 236.

⁴ *Leake on Contracts*, 568.

⁵ *Leake on Contracts*, 569.

⁶ *Wagner v. Nagel*, 33 Minn. 348.

a reputed wife, though she be not actually married.¹ The fact that a man married his wife unwillingly and to secure his discharge from a bastardy proceeding, and upon assurances that he would not be bound to live with her, does not in any way affect his duty to support her.² It has been held that a wife has no authority to lend her husband's goods.³ Her authority in business matters is special and limited, and when she exceeds that authority, her husband is not bound.⁴ She is not simply because she is a wife authorized to sell or trade the property of her husband, although such property consists of a sewing-machine kept in the house and used exclusively by herself.⁵ She has no authority to give an irrevocable license to enter upon her husband's real estate.⁶ Delivery to or possession by a wife is delivery to or possession by the husband only when such delivery or possession is lawful or he assents thereto. Therefore where the defendant, as bailee, held property of plaintiff, under instructions not to deliver it to any one without his written order, but defendant delivered the property to plaintiff's wife upon an order which proved to be a forgery, it was held that the defendant was liable for the value of the property, notwithstanding the fact that the defendant could maintain an action against both the husband and wife for the wrongful act of the latter.⁷

ILLUSTRATIONS. — Family supplies were bought by A's wife on credit of one who had been forbidden by A to sell to her on his account. The supplies were consumed in the family of which A was one. *Held*, that A was not liable for them: *Devendorf v. Emerson*, 66 Iowa, 698. A wife engaged a seamstress to do work in her husband's family, agreeing on the amount of wages, but not stating who was to pay her, the seamstress knowing that she was married. While the work

¹ *Robinson v. Nahon*, 1 Camp. 245.

² *State v. Ransell*, 41 Conn. 433.

³ *Green v. Sperry*, 16 Vt. 390; 42 Am. Dec. 519.

⁴ *Goodrich v. Tracy*, 43 Vt. 314; 5 Am. Rep. 281.

⁵ *Wheeler and Wilson Mfg. Co. v. Morgan*, 29 Kan. 519.

⁶ *Nelson v. Garey*, 114 Mass. 418.

⁷ *Kowing v. Manley*, 49 N. Y. 192; 10 Am. Rep. 346.

was going on, the wife told the seamstress that she had property of her own which she was going to sell, and when she sold it, she would pay her, and she did afterwards pay her a small sum on account. *Held*, that no action would lie against the wife: *Flynn v. Messenger*, 28 Minn. 208; 41 Am. Rep. 279. A placed a lightning-rod on B's house at the request of B's wife, who was not, nor did she pretend to be, her husband's agent for this or for any other business purpose. The rod was put up without B's knowledge, and the bill was made out against the wife alone. *Held*, that B was not liable, and that he could not be charged on the ground of ratification of the contract, for the reason that there was no element of agency in the case: *Meiners v. Munson*, 53 Ind. 138. A wife gave her old and needy brother a frock of small value, which he was much in need of, without the permission of her husband. *Held*, that the husband could not annul the gift, it being but a reasonable charity, which a wife had a legal right to give: *Spencer v. Storrs*, 38 Vt. 156. A husband permitted his wife to carry on a certain business in his name, and to draw in his name checks and notes to be used in the course of the business. *Held*, that she had no power to make him liable as surety for loans to third persons or upon mere accommodation paper: *Gulick v. Grover*, 31 N. J. L. 182. A husband, on leaving home, gave his wife authority to order off all persons coming on the premises to hunt, and the defendant had previously received permission from the husband to hunt on the premises. *Held*, that the mere ordering of the defendant off by the wife, without stating that she had authority from her husband, and without any knowledge on the part of the defendant of the authority actually given, or that she was in charge of the premises, did not continue a valid revocation of the license: *Kellogg v. Robinson*, 32 Conn. 335.

§ 720. What are Necessaries, and What are not. — What are or are not necessities for which the husband is liable is a question of fact depending upon the estate, condition, and circumstances of the parties; all reasonable expenses are included suitable to his rank and position.¹ The following have been held to be necessities: Costs of binding the husband over to keep the peace;² costs of divorce and legal proceedings against the husband;³ den-

¹ *Bazely v. Forder*, L. R. 3 Q. B. 562; *Hall v. Weir*, 1 Allen, 261; *Parke v. Kleeber*, 37 Pa. St. 251.

² *Grindell v. Godmond*, 5 Ad. & El. 755.

³ *Brown v. Ackroyd*, 5 El. & B. 819; *Wilson v. Ford*, L. R. 3 Ex. 63; *Porter v. Briggs*, 38 Iowa, 166; 18 Am. Rep. 27; *Sprayberry v. Merk*, 30 Ga. 81; 76 Am. Dec. 637; *Warner v.*

tistry;¹ furniture for a house;² jewelry such as persons in the wife's station were accustomed to wear;³ medicines and medical attendance;⁴ servants.⁵ The following have been held not necessities: Articles beyond the husband's circumstances and his place in society;⁶ counsel fees in a suit for divorce or to enforce a marriage settlement;⁷ medical services of a quack doctor;⁸ money lent to her, even for the purpose of obtaining necessities;⁹ rent of a pew in church.¹⁰

ILLUSTRATIONS.—The attending physician had advised the wife of a miller receiving thirty dollars per month, who was an invalid, to ride out in pleasant weather. *Held*, that a horse worth forty-five dollars might be considered suitable to the miller's condition in life, but that the question of suitability was a question of fact for the jury: *Cornelia v. Ellis*, 11 Ill. 584.

§ 721. Wife's Authority during Husband's Absence.

—During a husband's absence from home, the wife, as his agent, has extensive powers.¹¹ The wife of an absent

Heiden, 28 Wis. 517; 9 Am. Rep. 515; Conant v. Burnham, 133 Mass. 503; 43 Am. Rep. 532; *contra*, Johnson v. Williams, 3 G. Greene, 97; 54 Am. Dec. 491.

¹ Freeman v. Holmes, 62 Ga. 556; Gilman v. Andrews, 28 Vt. 241; 67 Am. Dec. 713.

² Hunt v. De Blaquiére, 5 Bing. 550.

³ Raynes v. Bennett, 114 Mass. 424.

⁴ Mayhew v. Thayer, 8 Gray, 172; Cothran v. Lee, 24 Ala. 380; Spaun v. Mercer, 8 Neb. 357; Webber v. Spambake, 2 Redf. 258; Carstens v. Hanselman, 61 Mich. 426; 1 Am. St. Rep. 606.

⁵ Bazeley v. Forder, L. R. 3 Q. B. 562.

⁶ Caney v. Patton, 2 Ashm. 140; Phillipse v. Hayter, L. R. 6 Com. P. 38.

⁷ Pearson v. Darrington, 32 Ala. 227; Morrison v. Holt, 42 N. H. 478; 80 Am. Dec. 121; Thompson v. Thompson, 3 Head, 527; Coffin v. Dunham, 8 Cush. 404; 54 Am. Dec. 769; Shelton v. Pendleton, 18 Conn. 417; Johnson v. Williams, 3 Iowa, 97; Drais v. Ho-

gan, 50 Cal. 121; Dow v. Eyester, 79 Ill. 254; Whipple v. Giles, 55 N. H. 139; Williams v. Monroe, 18 B. Mon. 514; Wing v. Hurlburt, 15 Vt. 607; 40 Am. Dec. 695; Ray v. Adden, 50 N. H. 82; 9 Am. Rep. 175. Legal expenses and fees are sometimes chargeable against a husband by statute: Thomas v. Thomas, 7 Bush, 665; Warner v. Heiden, 28 Wis. 517; 9 Am. Rep. 515; Glenn v. Hill, 50 Ga. 94. It will be seen from the cases cited *ante* that the decisions on this question are conflicting.

⁸ Wood v. O'Kelley, 8 Cush. 406.

⁹ Walker v. Simpson, 7 Watts & S. 83; 42 Am. Dec. 216; *contra*, Kenyon v. Ferris, 47 Conn. 510; 36 Am. Rep. 86.

¹⁰ St. John's Parish v. Bronson, 40 Conn. 75; 16 Am. Rep. 17.

¹¹ Meader v. Page, 39 Vt. 306; Benjamin v. Benjamin, 15 Conn. 347; 39 Am. Dec. 384; Savage v. Davis, 18 Wis. 608; Humes v. Taber, 1 R. I. 464; Rotch v. Miles, 2 Conn. 638; McAfee v. Robertson, 41 Tex. 355; Butts v. Newton, 29 Wis. 632; Buford v. Speed, 11 Bush, 338; Krebs v.

husband has power as general agent to bind him by her consent that hay attached on his farm may be fed to his cattle, where he has left her at home on the farm with several minor children, giving no other person charge of his affairs, and has been absent several months before the attachment.¹

ILLUSTRATIONS.—A wife, in her husband's absence, hired a house for a year and took possession. The husband, upon his return, within the first month resided there with her until towards the end of the month, when he paid the rent for that month, and then removed. *Held*, that he was liable for the rent of the premises for the whole term: *Berwick v. Dusenberry*, 32 How. Pr. 348. A. was sent to jail for four months for an assault upon his wife, by which she was disabled from work. He took with him all his money, leaving her no means of support, and in her extremity she sold to E., who knew her condition, a cooking-stove belonging to A., for a reasonable price, for the purpose of procuring the means of buying necessities, and used the money for that purpose. In replevin by A. against E., *held*, that the wife had power to make the sale: *Ahern v. Easterby*, 42 Conn. 546. S., about leaving home, left claims due him with M. for collection, and from the proceeds to pay a debt due B. and the remainder to S.'s wife. *Held*, that this constituted the wife S.'s agent: *Stall v. Meek*, 70 Pa. St. 181. A husband, absent from his family, had knowledge that his wife was keeping a boarding-house to support herself and children, and did not return to them or make any provision for them, but suffered her to continue the business and rent a house for that purpose, without expressing any dissent or publishing any prohibition, and she conducted it in a reasonable and prudent manner to support the family. *Held*, that he was liable on her contract to pay the rent of such house: *Rotch v. Miles*, 2 Conn. 638.

§ 722. **Husband may Revoke Authority.**—This presumptive agency may be revoked by the husband, and this is sufficiently done, it has been held, by giving notice to the wife, though it do not reach the party dealing

O'Grady, 23 Ala. 726; 58 Am. Dec. 312; *Felker v. Emerson*, 16 Vt. 653; 42 Am. Dec. 532; *Ranson v. Spangler*, 18 Cent. L. J. 29 (Iowa); *Casteel v. Casteel*, 8 Blackf. 240; 44 Am. Dec. 763.
¹ *Felker v. Emerson*, 16 Vt. 653; 42 Am. Dec. 532.

with her,¹ unless there have been previous dealings of the same kind through the wife with the same person and acknowledged by the husband, thus giving a foundation of special consent to the agency. In this case, the revocation would not be effectual without notice to the person dealing upon faith in the continuance of the agency.² A sale by a woman of her husband's chattels without authority, if afterwards ratified by his delivery thereof to the purchaser, passes the title.³

§ 723. Wife's Authority may Arise from Necessity—Husband Failing to Provide for Wife.—The husband is bound by law to maintain his wife in a manner suitable to his estate and condition; and if he fail to supply that maintenance, except under certain circumstances which justify him in withholding it, she may be entitled, from necessity, to pledge his credit to that extent;⁴ nor can the husband revoke or deprive her of such authority, even by express notice to the party who supplies her.⁵ The husband who fails to furnish his wife with necessary supplies is not excused from liability to one who does so furnish, by having given him a notice that he should not pay for anything not furnished on his written order.⁶

§ 724. Desertion or Expulsion of Wife.—Thus if a husband, by his conduct, compels his wife to leave his house, she has power to pledge his credit for her necessary maintenance elsewhere.⁷ So where he abandons

¹ Jolly v. Rees, 15 Com. B., N. S., 628.

² Trueman v. Loder, 11 Ad. & E. 589.

³ Pike v. Baker, 53 Ill. 163.

⁴ Manby v. Scott, 2 Smith's Lead. Cas. 375; Morrison v. Holt, 42 N. H. 478; 80 Am. Dec. 120.

⁵ Bolton v. Prentice, 2 Strange, 1214. "She is considered his agent with uncountermandable authority to order the necessaries on his credit":

Campbell, C. J., in Jenner v. Morris, 3 De Gex, F. & J. 51.

⁶ Pierpont v. Wilson, 49 Conn. 450.

⁷ Houliston v. Smyth, 3 Bing. 127;

Hancock v. McTuck, 10 Cush. 41; Mayhew v. Thayer, 8 Gray, 172; Reynolds v. Sweetzer, 15 Gray, 78; Hultz v. Gibbs, 66 Pa. St. 360; Billing v. Pitcher, 7 B. Mon. 458; 46 Am. Dec. 523; Shrock v. Shrock, 4 Bush, 684; Mitchell v. Treanor, 11 Ga. 324; 56 Am. Dec. 421.

her.¹ So if the husband introduce into his house an improper woman, with whom his wife could not reside;² or if he so ill treated his wife that, through reasonable apprehension of further violence, she was obliged to leave.³ But it is not necessary that she should have been actually turned out of doors, and it is enough that he has caused her to be in bodily fear of living with him;⁴ and so if she were merely turned out in effect, as by his selling all the furniture, breaking up his establishment, and going himself to live in lodgings.⁵ Nor can he relieve himself from liability by notice in the newspapers or to individuals.⁶ A deserted wife may acquire property, and control it and her person, and may be sued as a *feme sole*.⁷

§ 725. **When Husband not Liable.**—In general, if the wife of her own fault desert her husband, or refuse to live with him, her authority as his agent ceases, especially if she also commit adultery.⁸ But if she offer to return, and he will not receive her, he becomes liable.⁹ Where the wife, living separate in consequence of her husband's miscon-

¹ *Eller v. Crull*, 99 Ind. 375; *Carstens v. Hanselman*, 61 Mich. 426; 1 Am. St. Rep. 606.

² *Curwen v. Maguire*, *Hayes & J.* 178; *Aldis v. Chapman*, 1 Selw. N. P., 9th ed., 276; *Houlston v. Smyth*, 3 Bing. 127; *Horwood v. Heffer*, 3 Taunt. 421.

³ *Hunt v. De Blaquiére*, 5 Bing. 550; *Montague v. Benedict*, 3 Barn. & C. 635.

⁴ *Baker v. Sampson*, 14 Com. B., N. S., 383.

⁵ *Forristall v. Lawson*, 34 L. T., N. S., 903.

⁶ *Jenner v. Morris*, 3 De Gex, F. & J. 45; *Dixon v. Hurrell*, 8 Car. & P. 717; *Montague v. Benedict*, 3 Barn. & C. 635; *Bolton v. Prentice*, 2 Strange, 1214; *Todd v. Stokes*, 1 Ld. Raym. 444; *Whitmore v. Gale*, Black. D. & O. 199.

⁷ *Prescott v. Fisher*, 25 Ill. 390; *Love v. Moynihan*, 16 Ill. 277; 63

Am. Dec. 306; *Smith v. Silence*, 4 Iowa, 321; 66 Am. Dec. 137; *Wagg v. Gibbons*, 5 Ohio St. 580; *Cusack v. White*, 2 Mill Cons. 279.

⁸ *Atkyns v. Pearce*, 2 Com. B., N. S., 763; *Cooper v. Lloyd*, 6 Com. B., N. S., 519; *Eastland v. Burchell*, L. R. 3 Q. B. D. 432; *Morris v. Martin*, 1 Strange, 647; *Child v. Hardyman*, 2 Strange, 875; *Manby v. Scott*, 1 Sid. 109; *McCutchen v. McGahay*, 11 Johns. 281; 6 Am. Dec. 373; *Henderson v. Stringer*, 2 Dana, 292; *Hunter v. Boucher*, 3 Pick. 289; *Oinson v. Heritage*, 45 Ind. 73; *Bevier v. Galloway*, 7 Ill. 517; *Sturtevant v. Starin*, 19 Wis. 268; *Brown v. Mudgett*, 40 Vt. 68; *Porter v. Bobb*, 25 Mo. 36; *Billing v. Pilcher*, 7 B. Mon. 458; 46 Am. Dec. 523; *Gill v. Read*, 5 R. I. 543; 73 Am. Dec. 73; *Thome v. Kashan*, 51 Vt. 520.

⁹ *Cunningham v. Irwin*, 7 Serg. & R. 247; 10 Am. Dec. 458.

duct, is possessed of a separate maintenance of her own, no matter from what source derived, sufficient for her support, the husband will not necessarily be liable.¹ But it is otherwise if she is dependent for her allowance on a person who is not bound to pay it.² One who has received into his house a woman and her child who have been forced to leave their home through the cruelty of the woman's husband cannot recover from the husband for their maintenance, if one of his motives for receiving the woman was that he might maintain an adulterous intercourse with her.³

ILLUSTRATIONS.—A, a married woman, left her home without her husband's consent, and against his will, and went to the house of C, taking her infant child with her, and remained there six weeks. After she had been there about three weeks a daughter came to C's house to see her mother and bring her some clothes. The husband went several times to C's house to induce his wife to return; but C encouraged the wife to stay where she was, and also secreted the daughter so that the husband could not find her. C afterwards brought suit to recover board for the wife, infant, and daughter. *Held*, that the husband was not liable therefor: *Schnuckle v. Bierman*, 89 Ill. 454. A husband had used violence towards his wife on an occasion five months before their separation, and there has been other difficulties and quarrels, but it was not shown affirmatively that he was the offending party, nor that she left him in consequence of his misconduct; and it was also proved that she left to make a visit, and refused to return unless his relatives who lived with him would go away. *Held*, that he was not liable for her board furnished by her father during such separation: *Blowers v. Sturtevant*, 4 Denio, 46.

§ 726. Not Liable where Wife is Supplied with Sufficient Allowance.—The wife has no authority to pledge the husband's credit if she be sufficiently supplied by him with necessaries fit for her station, or she have a

¹ *Johnston v. Sumner*, 3 Hurl. & N. 199; *Thompson v. Hervey*, 4 Burr. 261; *Curwen v. Maguire*, *Hayes & J.* 2178; *Ewers v. Hutton*, 3 Esp. 255; 178; *Baker v. Barney*, 8 Johns. 72; *Burrett v. Booty*, 8 Taunt. 343.
5 Am. Dec. 326.

² *Almy v. Wilcox*, 110 Mass. 443.

³ *Whitmore v. Gale*, Black D. & O.

separate allowance for their purchase.¹ He is not liable after she has obtained a decree against him for

¹ *Jolly v. Rees*, 15 Com. B., N. S., 628; *Richardson v. Du Bois*, L. R. 5 Q. B. 51; *Mott v. Comstock*, 8 Wend. 544; *Kimball v. Keyes*, 11 Wend. 33; *Baker v. Barney*, 8 Johns. 72; 5 Am. Dec. 326; *Cromwell v. Benjamin*, 41 Barb. 558; *Carey v. Patton*, 2 Ashm. 140; *Furlong v. Hysom*, 35 Me. 332; *Rea v. Durkee*, 25 Ill. 503; *Oinson v. Heritage*, 45 Ind. 73; 15 Am. Rep. 258; *Alley v. Winn*, 134 Mass. 77; 45 Am. Rep. 297. In *Clark v. Cox*, 32 Mich. 204, Mr. Justice Cooley says: "The points in difference between the parties in this case may be stated thus: The plaintiffs maintain that the wife is presumably the agent of the husband in the purchase of her own apparel, and of such articles of use and comfort for the family as are usually purchased by the wife rather than the husband; and that, while husband and wife are living together, a dealer who has no knowledge of any express limitations imposed by the husband on the wife's authority to make such purchases may safely rely upon the legal presumption of her authority, and hold the husband liable on her purchases. The defendant, on the other hand, insists that the presumption goes no further than this: That if the husband does not himself procure for her the necessary articles suitable to her and his condition, or furnish her with money to procure them for herself, it is presumed he authorized her to purchase them on his credit; in other words, that any presumption that he authorizes her to employ his credit in the purchase of necessities is rebutted by his purchasing them himself, or giving her money for the purpose. And this was the view taken by the circuit judge. There can be no doubt, we think, that the authorities fully sustain the rulings of the court below." In *Debenham v. Mellor*, 12 Cent. L. J. 83, decided by the house of lords in November, 1880, the law is well summed up as follows, by Lord Blackburn: "This is merely a case where a husband and wife are living together, although not in fact keeping up any establishment, and where he has in

fact made her an allowance which, so far as one can judge from appearances, is sufficient to supply her with all necessary clothing, and the jury were satisfied that he directed her not to pledge his credit. The first question, therefore, is this, whether the respondent's wife had, from her position as a wife, any authority to pledge her husband's credit, although such authority had been revoked by him. I admit that the fact of a man living with his wife always affords evidence that he intrusts her with such authorities as are ordinarily given to a wife. In the ordinary case of the management of a household, the wife is the manager, and with such tradesmen as a butcher or a baker she would have authority to pledge her husband's credit; but even then I do not think the presumption would arise, if the husband gave her the means to procure the articles without credit. In the present case, however, your lordships have to determine whether the wife had a mandate to order clothes which it would be proper for her in her station of life to have, although the husband had forbidden her to pledge his credit, and had given her money to buy clothes. For the reasons given by the majority of the court of common pleas in *Jolly v. Rees*, and by the judges of the court of appeal in the present case, I am of opinion that there is nothing to authorize our holding that the wife had authority to pledge her husband's credit. I agree that if he knew that she had got credit, and had allowed the tradesmen to suppose that he sanctioned the transactions with them, it might well be agreed that there was such evidence of authority; that he could not revoke it without giving notice of the revocation to all who had acted upon the faith of his sanction. The general rule would be that which I have stated; but where an agent is clothed with an authority which is afterwards revoked, those who have dealt with him have a right to say, unless the revocation has been made known to them, that the principal is precluded from denying the continuance of that authority, in the contin-

alimony,¹ and he duly pays the amount fixed by the court to her.²

ILLUSTRATIONS.—A married woman ordered from a milliner a hat at the price of \$12.50, informing the milliner that it was intended as a present to a friend; but when the hat was finished, she refused to take it, and suit was brought against her husband for the price of the hat. On the trial, it appeared that the wife was fully supplied with hats; that she was in the habit of paying her own bills, and that he had no knowledge of the transaction. *Held*, that the husband was not liable for the price of the hat: *Sulter v. Mustin*, 50 Ga. 242.

§ 727. Credit Given to Wife only.—If it appears that the credit was given exclusively to the wife, the husband cannot be charged.³ But the fact that a person in selling goods to a married woman makes out the account to her alone in her married name, as is the usual practice, is not sufficient to show that the credit is given to her alone, exclusively of the liability of the husband.⁴ A married woman's giving her own note for the price of supplies bought by her for her husband's farm is not conclusive evidence that the indebtedness was incurred by her individually; the questions of her agency and her husband's liability are for the jury.⁵ Unless there be proof of an express contract on the part of a married woman to pay for

uance of which he has induced them, as reasonable persons, to believe. There have been many cases where a husband has sanctioned his credit being thus pledged by his wife, but there is no such case here. I cannot agree with my brother Byles that the cases have established that the fact of a wife living with her husband alone entitles tradesmen to presume that the husband has given an authority which he is precluded from afterwards denying. I think that in such a case, it is open for the husband to prove, if he can, that such an authority does not in fact exist, that being a question for the jury. This is not the case of the withdrawal of an authority which has been once given; but the question is, whether the appellants, who had never before dealt with either the wife or

the husband, were entitled to assume that the authority was implied from the mere fact of cohabitation, and I do not think that the law gave them any right to do so."

¹ *Bennett v. O'Fallon*, 2 Mo. 69; 22 Am. Dec. 440.

² *Crittenden v. Schermerhorn*, 39 Mich. 661; 33 Am. Rep. 440; *Hare v. Gibson*, 32 Ohio St. 33; 30 Am. Rep. 568.

³ *Metcalfe v. Shaw*, 3 Camp. 22; *Mitchell v. Treanor*, 11 Ga. 324; 56 Am. Dec. 421; *Happek v. Harthy*, 7 Baxt. 411; *Wilson v. Herbert*, 41 N. J. L. 454; 32 Am. Rep. 243.

⁴ *Jewsbury v. Newbold*, 26 L. J. Ex. 247.

⁵ *Gates v. Brower*, 9 N. Y. 205; 59 Am. Dec. 530.

dentistry done for herself and child, she being accompanied by her husband when introduced with the child to the dentist, there can be no recovery against her.¹ The fact that one selling goods to a wife expected her to get the money from her husband wherewith to pay does not render him liable for the debt, credit being given to her alone.²

§ 728. Ratification by Husband of Wife's Contracts. —

A husband may become liable upon contracts made by his wife in excess of her authority, if he subsequently ratifies them.³ Thus the husband may become liable to pay for articles ordered by his wife without his authority, if he sanctions the use of them; and a husband may be taken to have sanctioned the use of and so become liable for articles of dress or jewelry which his wife has ordered upon his credit, by seeing her wear them without disapprobation.⁴ So where he has control over the goods improperly ordered by the wife, and does not return them.⁵ But the fact that the husband suffers the goods to remain in his house where the vendor placed them, and does not offer to return them, or notify the vendor that he may remove them, does not amount to such a ratification of the unauthorized purchase as will render him liable.⁶ That goods bought by a wife to furnish her father's house have been paid for by her husband will not render him liable for goods bought by her on a subsequent occasion for the same purpose.⁷ A husband cannot disavow a sale by the wife of articles of personal property

¹ *Freeman v. Holmes*, 62 Ga. 556.

² *Morris v. Root*, 65 Ga. 686.

³ *Leake on Contracts*, 575.

⁴ *Montague v. Benedict*, 3 Barn. & C. 631; *Leaton v. Benedict*, 5 Bing. 28. Where wife purchases a set of artificial teeth, and her husband permits her to keep them after he discovers that she has made the purchase, and does not repudiate the contract, this raises an

implied contract on his part to pay for them what they are reasonably worth: *Gilman v. Andrus*, 28 Vt. 241; 67 Am. Dec. 713.

⁵ *Waithman v. Wakefield*, 1 Camp. 120; *Mackinley v. McGregor*, 3 Whart. 369; 31 Am. Dec. 522.

⁶ *Segelbaum v. Ensminger*, 117 Pa. St. 248; 2 Am. St. Rep. 662.

⁷ *Bray v. Beard*, 5 Mo. App. 584.

made with his knowledge, after standing by and seeing the wife use the proceeds derived from the sale.¹

§ 729. **Liability of Husband for Torts of Wife.**—At common law, the husband is liable for the torts of his wife committed either before the marriage² or after.³ The husband may be liable alone, or jointly with her. If the tort is committed in his presence, and nothing more appears, it is his sole tort,⁴ for she is presumed to have acted under his coercion.⁵ If the tort is committed in his presence, but it appears that she acted of her own free will, they are jointly liable.⁶ If the tort is committed in his

¹ *Delano v. Blanchard*, 52 Vt. 578.

² *Ferguson v. Collins*, 8 Ark. 241; *Phillips v. Richardson*, 4 J. J. Marsh. 212; *Brown v. Kemper*, 27 Md. 666; *Magruder v. Darnall*, 6 Gill, 269; *McCready*, 1 Tuck. 374; *In re Hawk v. Harman*, 5 Binn. 43; *Overholt v. Ells-well*, 1 Ashm. 200; *Hubble v. Fogartie*, 3 Rich. 413; 45 Am. Dec. 775; *Allen v. McCullough*, 2 Heisk. 174; 5 Am. Rep. 27.

³ *Hubble v. Fogartie*, 3 Rich. 413; 45 Am. Dec. 775; *Keen v. Hartman*, 48 Pa. St. 497; 86 Am. Dec. 606; 88 Am. Dec. 472; *Maffit v. Com.*, 5 Pa. St. 359; *McKeown v. Johnson*, 1 McCord, 578; 10 Am. Dec. 698; *Moon v. Henderson*, 4 Desaus. 459; *McQueen v. Fulgham*, 27 Tex. 463; *Tabb v. Boyd*, 4 Call. 453; *Roadcap v. Sipe*, 6 Gratt. 213; *Jackson v. Kirby*, 37 Vt. 448; *Woodward v. Barnes*, 46 Vt. 332; 14 Am. Rep. 626; *Bobe v. Fowner*, 18 Ala. 89; *Ferguson v. Collins*, 8 Ark. 241; *Baker v. Young*, 44 Ill. 42; 92 Am. Dec. 149; *Martin v. Robson*, 65 Ill. 129; 16 Am. Rep. 578; *Ball v. Bennett*, 21 Ind. 427; 83 Am. Dec. 356; *Choen v. Porter*, 66 Ind. 194; *McElfresh v. Kirkendall*, 36 Iowa, 224; *Enders v. Beck*, 18 Iowa, 86; *Phillips v. Richardson*, 4 J. J. Marsh. 212; *Hinds v. Jones*, 48 Me. 348; *Ferguson v. Brooks*, 67 Me. 251; *Marshall v. Oakes*, 51 Me. 308; *Nolan v. Traber*, 49 Md. 460; 33 Am. Rep. 277; *Handy v. Foley*, 121 Mass. 259; 23 Am. Rep. 270; *Heckle v. Lurvey*, 101 Mass. 344; 3 Am. Rep. 366; *Austin v. Cox*, 118 Mass. 58;

Austin v. Wilson, 4 Cush. 273; 50 Am. Dec. 766; *Miller v. Sweitzer*, 22 Mich. 391; *Burt v. McBain*, 29 Mich. 290; *Ricci v. Mueller*, 41 Mich. 214; *Brazil v. Moran*, 8 Minn. 236; 83 Am. Dec. 772; *Dailey v. Houston*, 58 Mo. 361; *Cram v. Dudley*, 28 N. H. 537; *Whitman v. Delano*, 6 N. H. 543; *Gove v. Farmers*, 48 N. H. 41; 2 Am. Rep. 168; *Carleton v. Haywood*, 49 N. H. 314; *Scott v. Gamble*, 9 N. J. Eq. 218; *Kowing v. Manly*, 49 N. Y. 192; 10 Am. Rep. 346; 57 Barb. 483; *Cassin v. Delaney*, 38 N. Y. 178; *Matthews v. Fiestel*, 2 E. D. Smith, 90; *Barnes v. Harris*, Busb. 15; *Cox v. Hoffman*, 4 Dev. & B. 180; *Clark v. Bayer*, 32 Ohio St. 299; 30 Am. Rep. 593; *Fowler v. Chichester*, 26 Ohio St. 9.

⁴ *Ball v. Bennett*, 21 Ind. 427; 83 Am. Dec. 356; *Marshall v. Oakes*, 51 Me. 308; *Miller v. Sweitzer*, 22 Mich. 391; *Brazil v. Moran*, 8 Minn. 236; 83 Am. Dec. 772; *Dailey v. Houston*, 58 Mo. 361; *Carleton v. Haywood*, 49 N. H. 314; *Cassin v. Delany*, 38 N. Y. 178; *Park v. Hopkins*, 2 Bail. 411; *Sisco v. Cheeney*, Wright, 9; *McKeown v. Johnson*, 1 McCord, 578; 10 Am. Dec. 698; *McQueen v. Fulgham*, 27 Tex. 463; *Jackson v. Kirby*, 37 Vt. 448.

⁵ *Nolan v. Traber*, 49 Md. 460; 33 Am. Rep. 277; *Franklin's Appeal*, 115 Pa. St. 534; 2 Am. St. Rep. 583.

⁶ *Nolan v. Traber*, 49 Md. 460; 33 Am. Rep. 277; *Carleton v. Haywood*, 49 N. H. 314; *Cassin v. Delany*, 38 N. Y. 178.

presence against his will, it is her tort, and he is liable with her.¹ If the tort is committed out of his presence, but by his direction, they are liable jointly.² A husband is liable in replevin for his wife's unlawful detention of another's chattels under claim of title in herself.³ He is not liable for the slanders uttered by his wife when he is not present and in which he does not participate.⁴ He is liable in trespass for an act done after the marriage by an animal which at the time of marriage belonged to the wife.⁵ It is no defense that they were living apart, so long as they are man and wife.⁶

But for moneys growing out of her contracts the husband is not liable.⁷ Thus where a tradesman cannot recover against the husband for goods supplied to the wife, they not being necessities, he cannot recover upon her false representations that they were necessities.⁸ Nor will an action lie against the husband and wife for her false and fraudulent representations that she was a widow at the time she executed a mortgage.⁹ Many of the recent married women's acts have taken away the husband's liability, and have placed it upon the wife's separate estate.¹⁰ Notwithstanding the statutes relating to a married woman's property in Ohio, her husband's common-law liability for her torts continues the same.¹¹ Although the liability of the husband at common law for the personal torts of his wife is not changed by the married

¹ Carleton v. Haywood, 49 N. H. 314.

² Handy v. Foley, 121 Mass. 259; 23 Am. Rep. 270; Clark v. Bayer, 32 Ohio St. 299; 30 Am. Rep. 593; Cassin v. Delany, 38 N. Y. 178; Brazil v. Moran, 8 Minn. 236; 83 Am. Dec. 772; Wheeler etc. Co. v. Heil, 115 Pa. St. 487; 2 Am. St. Rep. 575.

³ Choen v. Porter, 66 Ind. 194.

⁴ Norris v. Corkhill, 32 Kan. 409; 49 Am. Rep. 489.

⁵ Cram v. Dudley, 28 N. H. 537.

⁶ Head v. Briscoe, 5 Car. & P. 484; Overholt v. Elswell, 1 Ashm. 202.

⁷ Keen v. Hartman, 48 Pa. St. 497; 86 Am. Dec. 606; 88 Am. Dec. 472; Barnes v. Harris, Busb. 15; Carleton v. Haywood, 49 N. H. 314.

⁸ Woodward v. Barnes, 46 Vt. 332; 14 Am. Rep. 626.

⁹ Keen v. Hartman, 48 Pa. St. 497; 86 Am. Dec. 606; 88 Am. Dec. 472; Klein v. Caldwell, 91 Pa. St. 144.

¹⁰ Schouler on Husband and Wife, 325 et seq.; Martin v. Robson, 65 Ill. 129; 16 Am. Rep. 487; Ricci v. Muller, 41 Mich. 214.

¹¹ Holtz v. Dick, 42 Ohio St. 23; 51 Am. Rep. 791.

women's acts of New York, yet when such torts are committed in the management and control of her separate property, the rule is changed, and she only is liable. Such torts are matters "having relation to her sole and separate property," within the provision of the statutes of 1860 and 1862, that "the wife may sue and be sued in all matters having relation to her sole and separate property the same as if she were sole." Hence the husband need not be joined with the wife in an action for fraud in a contract for the sale of real estate of the wife, even where such contract is made by the husband as agent for the wife.¹

ILLUSTRATIONS.—A wife set fire to her own insured house, thereby destroying her tenant's furniture. *Held*, that the husband was not liable: *Lansing v. Holdridge*, 58 How. Pr. 449. A husband of a wife admitted to be insane is the owner of buildings insured by the defendants, and the care and custody of the wife are for the time being intrusted to her husband, and she burns the buildings while thus insane. *Held*, that the defendants will be liable for the loss unless they can show actual design, or such a degree of negligence on the part of the husband as will evince a corrupt design or fraudulent purpose on his part: *Gove v. Farmers' etc. Ins. Co.*, 48 N. H. 41; 97 Am. Dec. 572. An administratrix, a married woman, refused to return an inventory as prescribed by statute, and there was ground for the presumption that she acted under the coercion of her husband. *Held*, that an order to show cause should issue against the husband and wife jointly why an attachment should not issue against the husband or against both: *McCready's Case*, 1 Tuck. 374. A person without the authority or consent of the husband leaves money with the wife, and she applies it to her own use. *Held*, the husband is not liable: *Andrews v. Ormsbee*, 11 Mo. 400. A man applied for a loan of thirty pounds to a loan association upon the security of a promissory note to be signed by himself and sureties. One of the sureties was a married woman, who falsely represented herself to the association as single. The security was accepted and the loan made. Afterwards the loan association, recurring to the sureties for payment of the note, sought to make her husband liable on the note, alleging her fraud. *Held*, that the action was maintainable: *Liverpool etc. Loan Association v. Farhurst*, 9 Ex. 422.

¹ *Baum v. Mullen*, 47 N. Y. 577.

§ 730. Injuries to the Wife — The Husband's Right of Action.—For injuries to the person or character of the wife, the husband and wife must sue together.¹ "On these principles," says Mr. Schouler,² "it is held that husband and wife must sue together for libel or slanderous words spoken against the latter;³ also for battery of the wife;⁴ also for injuries sustained by her through the negligence of a common carrier;⁵ also for the malpractice of a physician;⁶ also for frauds upon the wife, as in case of an action *qui tam* to recover penalties for a fraudulent conveyance;⁷ also for malicious prosecution."⁸ A husband may sue for damages for the seduction of the wife,⁹ or for enticing her away from him.¹⁰ Two actions will lie, as a general rule, for tort committed upon the wife: 1. By the husband alone, for the loss of service, expenses, etc.; 2. By the husband and wife, for the injury to the wife's person.¹¹ In an action for enticing away plaintiff's wife, it is no defense that she went willingly, and defendant did nothing but furnish the means and opportunity for the elopement.¹² A marriage by a woman under the age of sixteen, without consent of her father, although forbidden by statute, becomes irrevocable by cohabitation

¹ Bingham on Infancy and Coverture, 217; Thomas v. Winchester, 6 N. Y. 397; 57 Am. Dec. 455. But where the right of action for damages is founded on the prior possession of personal property, the husband must sue alone, since his possession is the possession of both: Bingham on Infancy and Coverture, 253; Rawlins v. Rounds, 27 Vt. 17.

² Schouler on Husband and Wife, 341.

³ Smalley v. Anderson, 2 T. B. Mon. 56; 15 Am. Dec. 121; Davies v. Solomon, L. R. 7 Q. B. 112; Throgmorton v. Davis, 3 Blackf. 383; Beach v. Ranney, 2 Hill, 309; Saville v. Sweeney, 4 Barn. & Adol. 514; Ryan v. Madden, 12 Vt. 51; Shafer v. Abalt, 48 Md. 171; 30 Am. Rep. 456; Allsop v. Allsop, 2 L. T., N. S., 290; Gibson v. Gibson, 43 Wis. 23.

⁴ Pillow v. Bushnell, 5 Barb. 156.

⁵ Heirn v. McCaughan, 32 Miss. 17; Smith v. R. R. Co., 55 Mo. 456; 17 Am. Rep. 660.

⁶ Ballard v. Russell, 33 Ma. 196; 54 Am. Dec. 621. Even though it afterwards cause her death: Cross v. Guthery, 2 Root, 90; 1 Am. Dec. 61; Hyatt v. Adams, 16 Mich. 180.

⁷ Fowler v. Frisbie, 3 Conn. 320.

⁸ Laughlin v. Eaton, 54 Me. 156.

⁹ Van Vacter v. Killip, 7 Blackf. 578; Cross v. Rutledge, 81 Ill. 266; Hadley v. Heywood, 121 Mass. 236; Wood v. Mathews, 47 Iowa, 409; Conway v. Nichol, 34 Iowa, 533.

¹⁰ Barbee v. Armistead, 10 Ired. 530; 51 Am. Dec. 404.

¹¹ Rogers v. Smith, 17 Ind. 323; 79 Am. Dec. 483.

¹² Higham v. Vanosdol, 101 Ind. 160.

after that age, and if the mother subsequently induces her to leave her husband solely from motives of ill will toward him, the father is liable to an action therefor by the husband.¹ A husband may maintain an action for alienating his wife's affections, though no debauchery was practiced, and the wife still remained in the husband's house.² The loss of services of a wife injured by the negligence of a railroad company creates a cause of action which survives to the husband's administrator, being for a wrong done to "the property, rights, or interests" of the husband.³ An action can be maintained by a husband against a druggist to recover damages for selling the plaintiff's wife secretly, and from day to day, large quantities of laudanum to be used by her as a beverage, without the husband's knowledge or consent, when it is proved that defendant knew the use which the wife made of it, and that it seriously injured the wife's health, and deprived her husband of her society, etc., and that he was compelled to expend money for medical and other attendance upon her.⁴ The rule that a servant cannot recover of his master for damage sustained from the negligence of his fellow-servant does not prevent his maintaining an action against his master for consequential damages by him sustained through an injury to his wife from such negligence.⁵ A husband cannot maintain an action for conversion of his wife's separate property.⁶ At common law, where the action was for a tortious injury to a married woman, the husband suing alone might recover for the expenses of a cure, for loss of service and of the society of his wife; but where the husband and wife joined, the cause of action was the injury to the wife, and the recovery was limited to damages for that injury alone, which included the mental

¹ *Holtz v. Dick*, 42 Ohio St. 23; 51 Am. Rep. 791.

⁴ *Hoard v. Peck*, 56 Barb. 202.

⁵ *Gannon v. R. R. Co.*, 112 Mass.

² *Rinehart v. Bills*, 82 Mo. 534; 52 Am. Rep. 385.

234; 17 Am. Rep. 82.

⁶ *Hackett v. Hewitt*, 57 Vt. 442; 52

³ *Cregin v. R. R. Co.*, 56 How. Pr. 32, 465. Am. Rep. 132.

sufferings of the wife, but did not embrace the injury to the husband. The Iowa statute has changed the common-law rule as to an action by a man and wife for an injury to the wife; and the husband may, under that statute, join thereto a claim in his own right, and recover for the loss of his wife's services occasioned by the injury.¹

ILLUSTRATIONS. — A statute gave a right of action against a town for damage "to any person, his team, carriage, or other property," caused by reason of the insufficiency or want of repair of any highway. *Held*, that a man might recover under the statute for loss of his wife's services, and the expenses of her sickness resulting from an accident caused by a defective highway: *Hunt v. Town of Winfield*, 36 Wis. 154; 17 Am. Rep. 482. By statute a married woman was alone authorized to bring action for an injury to her person. *Held*, that the husband had also a right of action for consequential injury to himself, resulting from an injury to his wife, in being deprived thereby of her labor and service: *Mewhirter v. Hatten*, 42 Iowa, 288; 20 Am. Rep. 618.

¹ *McDonald v. R. R. Co.*, 26 Iowa, 124; 96 Am. Dec. 115.

CHAPTER XLIII.

DISABILITIES OF WIFE.

- § 731. Effect of marriage — Wife's earnings.
- § 732. Husband entitled to wife's personal property in possession.
- § 733. Wife's personalty not in possession; e. g., choses in action.
- § 734. What are "choses in action."
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- § 737. Effect of marriage — Husband entitled to wife's chattels real.
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- § 757. Conveyances and gifts to wife by husband after marriage — As against creditors.
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- § 760. Power of wife at common law to make will — Exceptions.
- § 761. Statutory powers to make will.
- § 762. Effect of marriage on wills of husband and wife.

§ 731. Effect of Marriage — Wife's Earnings.—The wife's earnings belong to the husband;¹ and so does real

¹ *McDavid v. Adams*, 77 Ill. 155; 55 Me. 611; *Woodbeck v. Havens*, 42 Bucher v. Ream, 68 Pa. St. 421; *Yopst Barb.* 66; *Reynolds v. Robinson*, 64 v. *Yopst*, 51 Ind. 61; *Gould v. Carlton*, N. Y. 885; *Prescott v. Brown*, 23 Ma.

estate purchased with the wife's earnings during coverture.¹ He alone can give a discharge for any demand which may arise from her services. He may, of course, constitute her his agent for receiving the pay to herself; but, without evidence of some such authority, the person who employs her—as a nurse, for instance—cannot protect himself by showing her separate receipts.² For these earnings the husband sues alone, and in his own name.³ A wife has no claim against the estate of her deceased husband for working for him in his business.⁴ A wife cannot acquire separate property from her husband in her savings out of a voluntary allowance from her husband, except by a clear irrevocable gift, either to some person as a trustee, or by some clear and distinct act of his by which he divests himself of the property.⁵ But a husband cannot recover his wife's earnings from one who has employed and paid her, where the wife has for a considerable period voluntarily and without good reason lived apart from her husband, and supported herself without any assistance from him, and where the husband, prior to the payment to the wife, did not claim her earnings.⁶ If a husband renounces to his wife his right to her earnings, he may revoke his renunciation before the consummation of the gift by delivery; and if the subject of the gift is a crop to

305; 39 Am. Dec. 623; *McLemore v. Pinkston*, 31 Ala. 266; 68 Am. Dec. 169; *Armstrong v. Armstrong*, 32 Miss. 279; *Belford v. Crane*, 16 N. J. Eq. 265; 84 Am. Dec. 155; *Hoyt v. White*, 46 N. H. 265; *Raybold v. Raybold*, 20 Pa. St. 308; *Stimson v. White*, 20 Wis. 562; *Jones v. Reid*, 12 W. Va. 350; 29 Am. Rep. 455; *Glaze v. Blake*, 56 Ala. 379; *Hamilton v. Booth*, 55 Miss. 60; 30 Am. Rep. 500; *Lyme v. Riddle*, 88 N. C. 463; *Cunningham v. Hanney*, 12 Ill. App. 437; *Gorman v. Wood*, 73 Ga. 370; *Skillman v. Skillman*, 15 N. J. Eq. 478; 82 Am. Dec. 279.

¹ *Cramer v. Reford*, 17 N. J. Eq.

367; 90 Am. Dec. 594; *Bynum v. Frederick*, 81 Ala. 489.

² *Offley v. Clay*, 2 Man. & G. 172; see *Glover v. Drury Lane*, 2 Chit. 117; *Russell v. Brooks*, 7 Pick. 65; but see *Starrett v. Wynn*, 17 Serg. & R. 130.

³ *Schouler on Husband and Wife*, 149; *Gould v. Carlton*, 55 Me. 511; *McDavid v. Adams*, 77 Ill. 155.

⁴ *In re Reuter*, 5 Demarest, 162.

⁵ *Kee v. Vasser*, 2 Ired. Eq. 553; 40 Am. Dec. 442; *Skillman v. Skillman*, 15 N. J. Eq. 478; 82 Am. Dec. 279.

⁶ *Norcross v. Rodgers*, 30 Vt. 588; 73 Am. Dec. 323.

be raised by the wife's labor, he may mortgage it before it is planted.¹

ILLUSTRATIONS. — A husband and wife were living with his mother, and for a period before the mother's death, the wife took care of her. *Held*, that, in the absence of any evidence of a contrary intention, it would be presumed that she rendered the services in behalf of her husband: *Morgan v. Bolles*, 36 Conn. 175. A deed was made to a trustee for the benefit of a married woman, and the consideration therefor was paid out of her earnings. There was no agreement, either ante or post nuptial, that she should be entitled to her earnings; and though the husband was away from home during most of the time when these earnings were made, his conduct did not amount to a desertion. *Held*, that such earnings were the property of the husband, and that the real estate purchased with them was subject to his debts: *Campbell v. Bowles*, 30 Gratt. 652.

§ 732. **Effect of Marriage — Personal Property in Possession Belonging to Wife.** — At common law, upon the marriage the husband becomes at once entitled to all the personal property of the wife in her possession. He may dispose of it as he sees fit during his life, whether with or without his wife's consent; he may bequeath it by will; and after his death such property is regarded as assets of his estate, the title passing to his executors and administrators, to the exclusion of the wife, though she survive him.² Upon marriage, the husband becomes entitled to all the money and personalty of the wife, but he may waive his right, and permit the wife to retain her money, and when such intention is manifested by the husband, and he shows by his conduct that he is not to derive any benefit from the personalty of the wife, and that he intends it to remain for her benefit, equity will not deprive her of the property, especially where creditors

¹ *Boyett v. Potter*, 80 Ala. 476.

² 2 Kent's Com. 143; Bingham on Infancy and Coverture, 208; *Legg v. Legg*, 8 Mass. 99; *Lamphir v. Creed*, 8 Ves. 599; *Winslow v. Crocker*, 17 Me. 29; *Hoskins v. Miller*, 2 Dev. 360; *Hyde v. Stone*, 9 Cow. 230; 18 Am. Dec. 501; *Morgan v. Thames Bank*,

14 Conn. 99; *Hawkins v. Craig*, 6 T. B. Mon. 257; *Caffey v. Kelly*, 1 Bush. Eq. 48; *Skillman v. Skillman*, 13 N. J. Eq. 403; *Hopkins v. Carey*, 23 Miss. 54; *Cropsey v. McKinney*, 30 Barb. 47; *Carleton v. Lovejoy*, 54 Me. 445; *Bell v. Bell*, 37 Ala. 536; 79 Am. Dec. 73.

are not thereby deprived of their rights.¹ Chattels bequeathed to the wife without restriction pass to the husband at once, like her other things in possession.² Personal property in the possession of a married woman is presumed to belong to her husband. If the fact is otherwise, it must be so shown.³ So where husband and wife live together in a house in which boarders are kept, the presumption of law is that the chattels in the house belong to the husband.⁴

ILLUSTRATIONS. — A wife on her husband's failure set up a claim for money of hers appropriated by him in his business many years before. There was no proof of an agreement to repay it, or of anything more than a general understanding that it was hers. *Held*, that as against his creditors her claim could not be maintained: *Farmers' and Merchants' Bank v. Jenkins*, 65 Md. 245. A wife began a divorce suit, which was discontinued under an agreement that the parties should live separate, and that the husband should pay the wife three thousand dollars. The money was paid. Afterwards the parties lived together again, and the wife lent the money to her husband, he giving her a note for it. *Held*, that the note was not a valid claim against the husband's estate as against his creditors: *Friedman v. Bierman*, 43 Hun, 387.

§ 733. Wife's Property not in Possession, or Choses in Action. — As to the wife's choses in action, marriage operates, not as an absolute gift of such property, but rather as a conditional gift, the condition being that the husband shall do some act, while coverture lasts, to appropriate the choses to himself. If he happen to die before he has done so, such choses, not having been reduced to possession, remain the property of the wife, cannot be reached by his creditors, and his personal representatives have no title in them.⁵ But this applies only to outstanding things in

¹ *Bryant v. Bryant*, 3 Bush, 155; 96 Am. Dec. 205.

² *Shirley v. Shirley*, 9 Paige, 363; *Newlands v. Paynter*, 4 Mylne & C. 408; *Crane v. Brice*, 7 Mees. & W. 183; *Rex v. French*, Russ. & R. C. C. 491.

³ *Hemelreich v. Carlos*, 24 Mo. App. 264.

⁴ *Rice v. Sayles*, 23 Ill. App. 189.

⁵ *Schouler on Husband and Wife*, 182; Co. Litt. 351; 1 *Bright on Husband and Wife*, 36; 2 *Kent's Com.* 135; *Scawen v. Blunt*, 7 Ves. 294; *Fleet v. Perrins*, L. R. 3 Q. B. 536; *Langham v. Nenny*, 3 Ves. 467; *Tritt v. Colwell*, 31 Pa. St. 228; *Needles v. Needles*, 7 Ohio St.

action; for some may have been reduced to possession by the husband during his lifetime, and some may not. If the wife die before the husband has reduced the chose to possession, he has no title in it as husband, but it goes, strictly speaking, to her administrator or personal representative,¹ though under our statutes the husband has commonly the right both to administer and inherit a good part of his wife's personal property, and she cannot will otherwise.² As to such choses in action as may accrue to the wife solely, or to the husband and wife jointly, during coverture, the same doctrine applies. The husband may disagree to his wife's interest and make his own absolute at any time during coverture, by recovering in a suit in his own name, or otherwise reducing them to possession. But until such disagreement, such choses in action belong to the wife, and if not reduced into possession by the husband, will likewise survive to her.³ Money coming to a married woman during coverture by inheritance, and by her intrusted to her husband for investment, and by him invested in land in his own name, being a chose in possession, becomes his absolute property by reason of his marital right, even though he received it from her in the capacity of her agent. Otherwise as to money acquired by her during coverture by her own frugality and industry.⁴ The husband may elect to take as land a legacy to

432; *Burleigh v. Coffin*, 22 N. H. 118; 53 Am. Dec. 236; *Miller v. Miller*, 1 J. J. Marsh. 169; 19 Am. Dec. 59; *Slocombe v. Breedlove*, 8 La. 143; 28 Am. Dec. 135; *Parsons v. Parsons*, 9 N. H. 309; 32 Am. Dec. 363; *Flory v. Becker*, 2 Pa. St. 470; 45 Am. Dec. 610; *Boozer v. Addison*, 2 Rich. Eq. 273; 46 Am. Dec. 43; *Arrington v. Screws*, 9 Ired. 42; 49 Am. Dec. 408; *Fisk v. Cushman*, 6 Cush. 20; 52 Am. Dec. 761; *Driggs v. Abbott*, 27 Vt. 580; 65 Am. Dec. 214; *Pierson v. Smith*, 9 Ohio St. 554; 75 Am. Dec. 486; *Greebel's Appeal*, 87 Pa. St. 105; *McVaugh v. McVaugh*, 10 Phila. 457; *Sallee v. Arnold*, 32 Mo. 532; 82 Am. Dec. 144; *Standeford v. Devol*, 21 Ind. 402; 83 Am. Dec. 351; *Dunn v. Lancaster*, 4 Bush, 581; 96 Am. Dec. 317.
¹ *Schouler on Husband and Wife*, 152; *Walker v. Walker*, 41 Ala. 353; *Leakey v. Maupin*, 10 Mo. 368; 47 Am. Dec. 120.
² *Schouler on Husband and Wife*, 152; *Miller v. Miller*, 1 J. J. Marsh. 169; 19 Am. Dec. 59.
³ *Schouler on Husband and Wife*, 152; *Standeford v. Devol*, 21 Ind. 404; 83 Am. Dec. 351; *Parsons v. Parsons*, 9 N. H. 309; 32 Am. Dec. 363; *Leakey v. Maupin*, 10 Mo. 368; 47 Am. Dec. 120.
⁴ *Kidwell v. Kirkpatrick*, 70 Mo. 214.

his wife of a share of proceeds of land directed to be sold, and may by such election vest the fee in himself or in her, the result depending upon his intention.¹ Damages recovered in an action by husband and wife for personal injuries to the wife are the property of the husband, and not of the wife.² For choses in action accruing to the wife during coverture he may sue alone;³ for her antenuptial choses he must join his wife in the suit.⁴

§ 734. **What are "Choses in Action."**—By the wife's things in action, as distinguished from things in possession, is meant such property as rests upon contract or other security. The following are examples, viz.: Bonds and certificates of stock;⁵ debts owing the wife, arrears of rent, and outstanding loans;⁶ legacies and distributive shares;⁷ negotiable paper of all kinds;⁸ public securities.⁹

§ 735. **What Constitutes Reduction into Possession of Wife's Choses in Action.**—Mere intention on the part of the husband to reduce a chose in action of the wife into his possession is not enough; there must be a positive act of ownership exercised by him over it.¹⁰ Nor will taking possession of it make it his, and take it from the wife, unless he intended by such act to reduce it into his possession.¹¹ "Nor is actual possession of the chose in action a sufficient reduction *per se*, for the husband's intention may be to hold it in the right of another. Thus he may take the property in trust for his wife, and if so,

¹ *Hannah v. Swarner*, 3 Watts & S. 223; 38 Am. Dec. 754.

² *Shaddock v. Clifton*, 22 Wis. 114; 94 Am. Dec. 588.

³ *Boozar v. Addison*, 2 Rich. Eq. 273; 46 Am. Dec. 43.

⁴ *Thompson v. Ellsworth*, 1 Barb. Ch. 624; *Tucker v. Gordon*, 5 N. H. 564.

⁵ *Slaymaker v. Bank*, 10 Pa. St. 373.

⁶ *Clapp v. Stoughton*, 10 Pick. 463.

⁷ 2 Kent's Com. 135; *Parsons v. Parsons*, 9 N. H. 309; 32 Am. Dec. 363.

⁸ *Rogers v. Pike Co. Bank*, 69 Mo. 560; *Hayward v. Hayward*, 20 Pick. 525; *Phelps v. Phelps*, 20 Pick. 556; *Stevens v. Beals*, 10 Cush. 291; 57 Am. Dec. 108; *Westmoreland v. Foster*, 60 Ala. 448.

⁹ *Brown v. Bokee*, 53 Md. 155.

¹⁰ *Blount v. Bestland*, 5 Ves. Jr. 515.

¹¹ *Estate of Hinds*, 5 Whart. 138; 34 Am. Dec. 542; *McDowell v. Potter*, 8 Pa. St. 192; 49 Am. Dec. 503.

he is accountable like any other trustee.¹ So he may receive it as a loan from his wife, in which case he shall refund it like any other borrower. That reduction into possession which makes the chose absolutely as well as potentially the husband's is a reduction into possession, not of the thing itself, but of the title to it."² A wife's legacy paid to her husband continues her property after his death, and constitutes a claim against his estate when he received it, not in virtue of his marital rights, but under an agreement to hold it for her use, which constituted him her trustee.³ Reduction into possession may be effected through the medium of a third person duly empowered to act for that purpose.⁴ And the receipt of the wife's distributive share by an agent appointed under a power of attorney executed by the wife to her husband is a sufficient reduction by the husband, and enables the latter to sue the attorney for the proceeds.⁵ The husband's right to reduce the choses in action of his wife into his possession is a right personal to him, which he may refuse to exercise, and thus keep the property vested in the wife.⁶ In such case the property cannot be reached by his creditors.⁷ But if he once reduces it to his possession, they can reach it, and he cannot transfer it again to his wife in prejudice of their pre-existing rights, even though it vested in him but for a brief time.⁸ And even his subsequent promise to refund that which he has once made absolutely his own is a promise without legal consideration, and the wife or her representative cannot enforce it.⁹

¹ *Baker v. Hall*, 12 Ves. Jr. 497; *Estate of Hinds*, 5 Whart. 138; 34 Am. Dec. 542; *Mayfield v. Clifton*, 3 Stew. 375; *Resor v. Resor*, 9 Ind. 347; *Ball on Husband and Wife*, 57.

² *Schouler on Husband and Wife*, 154; *Tritt v. Colwell*, 31 Pa. St. 233.

³ *State v. Reigart*, 1 Gill, 1; 39 Am. Dec. 628.

⁴ *Schouler on Husband and Wife*, 156.

⁵ *Turton v. Turton*, 6 Md. 375; *Alexander v. Crittenden*, 4 Allen, 342.

⁶ *Harris v. Taylor*, 3 Sneed, 536; 67 Am. Dec. 576; *Gallego v. Gallego*, 2 Brock. 287; *Mellinger v. Banaman*, 45 Pa. St. 522; *Stoner v. Commonwealth*, 16 Pa. St. 387; *Snowden v. Lindsley*, 6 Cold. 122.

⁷ *Schouler on Husband and Wife*, 156; *Robinson v. Woelpper*, 1 Whart. 179; 29 Am. Dec. 44.

⁸ *Nolen's Appeal*, 23 Pa. St. 37.

⁹ *Fletcher v. Updike*, 3 Hun, 350.

As to assignments made by the husband of the wife's things in action, it has been held that an assignment purely voluntary and without consideration does not take away the rights of the wife.¹ But an assignment to a purchaser for value, it is held in Pennsylvania and other states, bars the wife's right of survivorship.² In England the rule now is, that the husband's assignment for value to a specific purchaser will bar the wife's survivorship, provided the husband has, during coverture, the right of reducing into his own possession, but that he cannot assign so as to bar the wife's survivorship, unless such reduction becomes possible before his death.³ And this, according to Mr. Schouler,⁴ is the prevailing American doctrine.⁵ And the following have been held a reduction into possession by the husband, viz.: Indorsing a note by the husband to himself or a third person;⁶ giving a receipt for the thing by the husband;⁷ payment to the husband of a legacy, after suit brought for it;⁸ transfer of stock standing in wife's name to husband's name.⁹ And the following have been held not to be a reduction into possession: Agreeing to sell the chose in action;¹⁰ bringing suit for a legacy in the joint

¹ *Hartman v. Dowdell*, 1 Rawle, 279; *Johnson v. Johnson*, 1 Jacob & W. 472.

² *Shuman v. Reigart*, 7 Watts & S. 169; *Siter's Case*, 4 Rawle, 461; *Smilie's Estate*, 22 Pa. St. 130; *Webb's Appeal*, 21 Pa. St. 248; *Manion v. Tinsworth*, 18 B. Mon. 582; *Tuttle v. Fowler*, 22 Conn. 58; *Hill v. Townsend*, 24 Tex. 575.

³ *Tidd v. Lister*, 17 Eng. L. & Eq. 567; 3 De Gex, M. & G. 857; *Honner v. Morton*, 3 Russ. 65; *Stanton v. Hall*, 2 Russ. & M. 175; *Elliott v. Cordell*, 5 Madd. 149.

⁴ *Schouler on Husband and Wife*, 157.

⁵ *Schouler on Husband and Wife*, 157, citing *Bugg v. Franklin*, 4 Sneed, 129; *George v. Goldsby*, 23 Ala. 326; *Arrington v. Yarbrough*, 1 Jones Eq. 72; *Lynn v. Bradley*, 1 Met. (Ky.) 232; *O'Connor v. Harris*, 81 N. C. 279;

Smith v. Atwood, 14 Ga. 402; *State v. Robertson*, 5 Harr. (Del.) 201; *Needles v. Needles*, 7 Ohio St. 432; 70 Am. Dec. 85; *Bryan v. Spruill*, 4 Jones Eq. 27; *Dunn v. Lancaster*, 4 Bush, 581; 96 Am. Dec. 317.

⁶ *Mason v. Morgan*, 2 Ad. & E. 30; *Evans v. Secrest*, 3 Ind. 545.

⁷ *Schouler on Husband and Wife*, 154; *Lowe v. Cody*, 29 Ga. 117. But not where the receipt is given by both husband and wife jointly: *Timbers v. Katz*, 6 Watts & S. 290.

⁸ *Alexander v. Crittenden*, 4 Allen, 342.

⁹ *Arnold v. Ruggles*, 1 R. I. 165; *Slaymaker v. Bank*, 10 Pa. St. 373; *Brown v. Bokee*, 53 Md. 155. *Aliter*, when the transfer is to husband and wife jointly: *Nicholson v. Drury et al.* Building Co., L. R. 7 Ch. Div. 48.

¹⁰ *Harwood v. Fisher*, 1 Youngs & C. 110.

names;¹ pledging the thing or assigning it as collateral security;² purchasing the interest of the life tenant in his wife's reversion;³ receiving interest due on a bond or note.⁴

ILLUSTRATIONS. — Husband and wife brought replevin for personal property of the wife, which was taken under the writ and delivered to the husband. After delivery, but before judgment, the wife died. *Held*, that there was sufficient reduction to possession by the husband, as for the purposes of the suit, to perfect his title to the property: *McNeil v. Arnold*, 17 Ark. 154. A testator by his will directed that all his property should be kept together until his daughter became of lawful age or married, then to be divided equally between the wife and daughter; but if the daughter died without issue, then to the wife. The wife married again, and her husband took and held possession of the property, claiming the same by virtue of the marriage. *Held*, that this was a sufficient reduction to possession to vest in the husband his wife's share: *Scott v. James*, 4 Miss. 307. Before the passage of the statutes changing the common-law rights of the husband in his wife's property, a husband, being executor of a will under which his wife was a legatee, took the amount of the legacy and intermingled it with his other property. *Held*, a reduction to possession which precluded the wife from claiming a trust: *Bridgman v. Bridgman*, 138 Mass. 58. By virtue of a power of attorney given by the wife to her husband, to collect her share of an intestate's property in New Orleans, with power to sue, etc., also to create other attorneys, the money was collected by an attorney so appointed by the husband three days before his death. *Held*, the collection by the attorney was a reduction into possession of the wife's chose in action, and whether the attorney was acting for the wife or for the husband, the property belonged to the husband's estate: *Turton v. Turton*, 6 Md. 375. The holder of a promissory note bequeathed to his daughter, and her heirs and assigns, all the money due to him from the maker, who was her husband, and appointed the husband his executor. The husband

¹ *Knight v. Brauner*, 14 Md. 1; *Harris v. Taylor*, 3 Sneed, 536; *Hall v. McLain*, 11 Humph. 425.

² *Latourette v. Williams*, 1 Barb. 9; *Hartman v. Dowdel*, 1 Rawle, 279. "There is a dictum of Chancellor Kent (2 Kent's Com. 137; also in *Schuyler v. Hoyle*, 5 Johns. Ch. 196) to the effect that the mortgage of a chose in action is of itself a sufficient reduction into possession. We find no authorities to

support this statement. But see *Tritt v. Colwell*, 31 Pa. St. 228, a recent case which recognizes a distinction in this respect between a pledge and a mortgage": *Schouler on Husband and Wife*, 155, note.

³ *Caplinger v. Sullivan*, 2 Humph. 548; 37 Am. Dec. 575.

⁴ *Stanwood v. Stanwood*, 17 Mass. 57; *Burr v. Sherwood*, 3 Bradf. 85.

inventoried the note, and in his administration account charged the amount of the legacy as paid, which charge was allowed. *Held*, that the legacy vested immediately in the husband, it not being a chose in action; but that if it were such, it was reduced by him to possession: *Peirce v. Thompson*, 17 Pick. 391. It was agreed between the administrator of an estate and the distributees that the property should be sold at auction, and the distributees each purchase an amount equal to his distributive share, and the sale was had accordingly; and a husband of one of the distributees purchased to the amount of her distributive share, gave his note for the amount, and died before a settlement was had with the administrator. *Held*, that this was a reduction of the share of the wife by the husband to his possession, and that his administrator was entitled to it: *Lasseter v. Turner*, 1 Yerg. 413. A wife became entitled to a distributive share of an intestate estate, of which her husband was the administrator; and the husband and the other next of kin, there being other funds for the payment of the debts, agreed to employ the negroes, etc., on the lands of the intestate, and at the end of the year to divide the proceeds of the crop among themselves, "according to their rights as distributees." *Held*, that this was a sufficient reduction into possession by the husband to prevent any right of survivorship in the wife: *Mardree v. Mardree*, 9 Ired. 295. A husband collects rents on his wife's realty. *Held*, that there must be express evidence to show that he held them in trust for her: *Dillenberger v. Wrisberg*, 10 Mo. App. 465. A wife was entitled to a legacy and was owner of bank stock. Her husband received the legacy, receipting for it in her name, and the bank stock she transferred to him. *Held*, that he had reduced both stock and legacy to possession: *Rice v. McReynolds*, 8 Lea, 36. The late husband of the plaintiff was co-administrator of her father's estate, and on the receipt by him of several sums of money to which she was entitled, he declared that "it was his wife's, and she should have it." *Held*, that there had been no reduction to possession by the husband so as to bar the claim of the widow for the money: *In re Gochenaur*, 23 Pa. St. 460. A married woman collected insurance money upon her house and then invested it in real estate, her husband assenting. *Held*, that the money thus collected was not reduced to possession by the husband: *Coz v. Scott*, 9 Baxt. 305. A woman, on the day of her marriage, delivered to her husband, through a third person, two checks which were wedding presents to herself. The husband deposited the checks to the credit of a firm of which he and A were members. A had no knowledge of an intention on the part of the wife to charge the amount to the firm as a loan. The wife afterwards sued the firm. *Held*, that she could not recover: *Brock v. Brock*, 116

Pa. St. 109. In an action against a bank on a certificate of deposit by a married woman, it appeared that the woman's husband was authorized to sell her land and collect the price, and that he then, without authority, deposited it in his own name, but afterwards transferred it to hers to avoid creditors, and that the bank paid out a portion on his checks. *Held*, that the money had not been reduced to the husband's possession: *Rodgers v. Pike Co. Bank*, 69 Mo. 560. A father devised and bequeathed to his two sons and daughter, infants of tender years, real and personal estate, to be equally divided between them, and directed that the share of the daughter should be assigned to her on her marriage, or on her attaining her majority if she desired it. She married, and died three months afterwards, she and her husband not having, during coverture, asked or desired a division of the estate, the same remaining in the possession of the executors. On a bill filed by the husband for his wife's share of the estate, *held*, that he was not entitled thereto, he not having reduced the same to possession during coverture: *Bibb v. McKinley*, 9 Port. 636. The makers of a promissory note, given for the purchase of the wife's real estate, and made payable to her or bearer, deliver it to the husband, who immediately turns it over to the wife, she afterwards retaining the same in her possession. *Held*, that the note is not converted by the husband, and the wife's property therein is not divested: *Barber v. Slade*, 30 Vt. 191; 73 Am. Dec. 299. A husband received money from his wife to invest for her. He paid her interest and acknowledged his indebtedness. *Held*, that he was her trustee: *Rusling v. Rusling*, 42 N. J. Eq. 594. A husband took, in his own name, a certificate of bank stock purchased with his wife's money, but gave her the certificate to keep, and a paper stating the facts. Subsequently, on the bank becoming a national bank, he took out a new certificate in his own name and collected dividends. *Held*, that he had reduced the stock to his possession: *Cummings v. Cummings*, 143 Mass. 340.

§ 736. **Wife's Equity to a Settlement.**—Whenever the husband or his representative was forced to seek the aid of a court of chancery to recover his wife's property, i. e., to reduce it into his possession, the court obliged him to set apart a portion for the separate benefit of herself and her children, and this was called the wife's equity to a settlement.¹ And finally it was held that not only when

¹ 2 Kent's Com. 137-143; 2 Story's Johns. Ch. 33; 10 Am. Dec. 310; Eq. Jur., sec. 635; *Glen v. Fisher*, 6 Helms v. Franciscus, 2 Bland. Ch

the husband was the suitor, but also when the wife alone petitioned for it, a court of equity would grant her the right to her equity to a settlement out of the personalty which she brought to her husband.¹ Equity will provide a sufficient maintenance for a wife and her children out of property descending to her during coverture from her father, before requiring such property to be applied to the satisfaction of the claims of her husband's creditors.² The wife's equity does not attach upon her legal choses in action, the aid of a court of equity not being required to enable her husband or his assignee to reduce them into possession; and the collection thereof by the latter will not be restrained until a suitable provision shall be made for the wife.³ Where it appears that all the property sought is not more than sufficient to make an adequate and necessary provision for the wife, the bill will be dismissed.⁴ The wife's right of survivorship, but not her equity to settlement, will be destroyed by the husband's

544; 20 Am. Dec. 402; *Duvall v. Bank*, 4 Gill & J. 282; 23 Am. Dec. 558; *Wilks v. Fitzpatrick*, 1 Humph. 54; 34 Am. Dec. 618. "On what grounds," says Mr. Snell (*Snell's Eq.* 340), "is the interference of equity derogating from the husband's legal rights, and compelling him to make a settlement on his wife, to be supported? Firstly, it is safe to assert that her equity to a settlement does not depend on any right of property in her, and this position will appear the more clear when it is considered to what limitations her equity is subject. The amount is discretionary in the court, and if the wife insists upon it, she must claim it for herself and her children, and not for herself alone, — limitations which are wholly inconsistent with a right of property in her: *Osborn v. Morgan*, 3 Hare, 434. The right being thus independent of property, there seems to be no ground, secondly, on which it can rest, except the control which courts of equity exercise over property falling

under their dominion. It is, in truth, the mere creature of equity deduced originally, where the husband sued, from the rule that he who comes into equity must do equity; that is, the court refused its aid to the plaintiff husband in seeking to acquire what the law would have given him if the court of common law had had jurisdiction in the matter; and as the court of law had no jurisdiction, he returned into the court of equity, which consented to lend him its aid only upon certain conditions which the court considered he ought to comply with, although the subject of the conditions should be one which the court would not have otherwise enforced."

¹ *Elibank v. Montalieu*, 1 Smith's Lead. Cas. 464.

² *Elliot v. Waring*, 5 T. B. Mon. 338; 17 Am. Dec. 69.

³ *Wiles v. Wiles*, 3 Md. 1; 56 Am. Dec. 733.

⁴ *Browning v. Headley*, 2 Rob. (Va.) 340; 40 Am. Dec. 755.

transfer of her choses in action that he has a right to reduce into immediate possession.¹

§ 737. Effect of Marriage — Wife's Chattels Real.—

Upon the marriage, the wife's chattels real, such as leases and terms for years, go to the husband, provided he does some act to appropriate them before her death.² He may sell, assign, mortgage, or otherwise dispose of his wife's chattels real without her consent or concurrence, excepting always such property as she may hold by way of settlement or otherwise as her separate estate.³ Chattels real, unappropriated during coverture, vest in the wife absolutely, if she be the survivor. In all these respects they resemble choses in action. But if the husband be the survivor, such chattels will belong to him *jure mariti*, and not as representing his wife. And in this respect they resemble choses in possession.⁴ As to the wife's chattels real, therefore, husband and wife are in possession during coverture by a kind of joint tenancy, with the right of survivorship each to the other; not, however, like joint tenants in general, but rather under the title of husband and wife, since husband and wife are, in contemplation of law, but one person, and incapable of holding either as joint tenants or tenants in common.⁵ A conveyance by a husband passes the entire interest of his wife, entitled to a life estate, if he survives her; but if she survives him, it passes her estate during his life only.⁶

§ 738. Wife's Real Estate.—By marriage, the husband becomes entitled to the usufruct of all real estate

¹ Wright v. Arnold, 14 B. Mon. 638; 61 Am. Dec. 172.

² Co. Lit. 46; 2 Kent's Com. 134; Sir Edward Turner's Case, 1 Vern. 7; Whitmarsh v. Robertson, 1 Coll. N. C. 570. As to what are chattels real, see 1 Schouler on Personal Property, 29, 45-73.

³ Tullett v. Armstrong, 4 Mylne &

O. 395; Draper's Case, 2 Freem. 29; Bullock v. Knight, Cas. Ch. 266.

⁴ Schouler on Husband and Wife, 164.

⁵ Schouler on Husband and Wife, 164; 2 Kent's Com. 135.

⁶ Evans v. Kingsberry, 2 Rand. 120; 14 Am. Dec. 779.

owned by the wife at the time of her marriage, and of all such as may come to her during coverture. He is entitled to the rents and profits during coverture.¹ His estate is, therefore, a freehold. But it will depend upon the birth of a child alive during coverture whether his estate shall last for a longer term than the joint lives of himself and wife, or not; that is to say, whether he acquires the right of curtesy initiate, to be consummated on the death of his wife leaving him surviving.² In the event of such birth, his interest lasts for his own life, whether his wife dies before him or not. If there be no child born alive, his interest lasts only so long as his wife lives. In either case, he has not an absolute interest, but only an estate for life, and his right is that of beneficial enjoyment. When his estate has expired, the real estate vests absolutely in the wife or her heirs, and the husband's relatives have no further concern with it.³ The husband may collect and dispose of the rents. He may also sue in his own name for injury to the profits of his wife's real estate; as where growing crops are destroyed or carried off; for this relates to his usufructuary interest. But for injuries to the inheritance, such as trespass, by cutting trees, burning fences, and pulling down houses, and generally in actions for waste, the wife must be joined; and if the husband dies before recovering damages, the right of action survives to the wife.⁴ A husband has no power to grant a perpetual easement, such as a railroad right of way in his wife's land.⁵ The husband's interest in his wife's real estate is liable for his debts, and may be taken on execution against him.

¹ *Bowie v. Stonestreet*, 6 Md. 418; *Am. Dec.* 618; *Clarke's Appeal*, 79 61 *Am. Dec.* 318; *Harrod v. Myers*, Pa. St. 376; *Rogers v. Brooks*, 30 Ala. 21 Ark. 592; 76 *Am. Dec.* 409. 612; *Van Duzer v. Van Duzer*, 6

² *Schouler on Husband and Wife*, 167.

Paige, 366; 31 *Am. Dec.* 257.
⁴ *Schouler on Domestic Relations*, 167.

³ *Schouler on Husband and Wife*, 167; 2 *Kent's Com.* 130; *Junction R. R. Co. v. Harris*, 9 Ind. 184; 68

⁵ *Gulf, Col. etc. R. R. Co. v. Donahoo*, 59 Tex. 123.

But nothing more than the husband's usufruct is thereby affected, nor can the attachment or sale affect the wife's ultimate title.¹

§ 739. Power of Husband to Convey and Alienate.—The husband alone has power at common law to bind or alienate the wife's lands during coverture. This right lasts, at any rate, during their joint lives (provided the parties are not in the mean time divorced); and if the husband becomes a tenant by curtesy, it lasts during his whole life. But the husband's power is commensurate with his estate. He cannot encumber the property beyond the period of his life interest, nor prevent his wife, if she survives him, or her heirs after his death, from enjoying the property free from all encumbrances which he may have created.² By the common law, if the husband and wife sell and convey her lands, the money which he receives therefor, without any reservation of rights on her part, will belong to him.³ A married woman permitting her husband to mortgage her separate property in her presence uncontradicted is estopped from claiming it against the mortgagees.⁴ Covenants of warranty of a *feme covert* in a deed of her real estate will operate as an estoppel to her asserting any subsequently acquired title to the land.⁵

ILLUSTRATIONS.—A railroad company constructed its road on land belonging to a married woman, which her husband had attempted by a void deed to convey, the company claiming title under such deed. *Held*, that after the wife's disability ceased, she could maintain ejectment for the land: *Bradley v. Missouri Pacific R. R. Co.*, 91 Mo. 493.

¹ Schouler on Husband and Wife, 168, citing 2 Kent's Com. 131; *Babb v. Perley*, 1 Me. 6; *Mattocks v. Stearns*, 9 Vt. 326; *Perkins v. Cottrell*, 15 Barb. 446; *Brown v. Gale*, 5 N. H. 416; *Canby v. Porter*, 12 Ohio, 79; *Williams v. Morgan*, 1 Litt. 168; *Nicholls v. O'Neill*, 10 N. J. Eq., 88; *Montgomery v. Tate*, 12 Ind. 615; *Lucas v. Rickerich*, 1 Lea, 726; *Sale v. Saunders*, 24 Miss. 24; 57 Am. Dec. 157; *Cheek v. Waldrum*, 25 Ala. 152.

² Schouler on Husband and Wife, 170.

³ *Kesner v. Trigg*, 98 U. S. 50.

⁴ *Levy v. Gray*, 56 Miss. 318; *Coleman v. Semmes*, 56 Miss. 321.

⁵ *Hill v. West*, 8 Ohio, 222; 31 Am. Dec. 442.

§ 740. **Statutory Mode of Conveying Wife's Lands.**—

In nearly all of the states the real estate of a married woman must be conveyed by a deed joined in by both husband and wife, and acknowledged as their deed, before some officer, by the parties.¹ The wife alone cannot convey.² A contract on the part of the husband to sell the wife's land, though known and assented to by her, is not binding upon her or her heirs. She can only bind herself by executing a deed in the form prescribed by law.³ The deed of a *feme covert* not executed according to a statute cannot be regarded as an agreement to convey, the specific performance of which will be decreed against her.⁴ A married woman's deed, although recorded, if defectively acknowledged, is not constructive notice, she alone conveying, the husband joining, but giving no warranty.⁵ A wife joining with her husband in execution of a deed does not convey her interest in the premises granted. To have such effect, her name must be inserted in the body of the instrument.⁶ A statute requiring a husband to join his wife in the execution of a deed does not necessarily require that his name should appear in the granting clause, if he signs, seals, and acknowledges it.⁷ A married woman who has insufficiently executed a deed of her real estate to one having knowledge of her coverture is not estopped from reclaiming the land by the fact that she has received

¹ Schouler on Husband and Wife, 174, citing 1 Washburn on Real Property, 281, and cases cited: *Davey v. Turner*, 1 Dall. 15; *Jackson v. Gilchrist*, 15 Johns. 109; *Page v. Page*, 6 Cush. 196; 2 Kent's Com. 151-155; *Albany Fire Ins. Co. v. Bay*, 4 N. Y. 9; *Ford v. Teal*, 7 Bush, 156; *Mount v. Kesterson*, 6 Cold. 452; *Tourville v. Pierson*, 30 Ill. 446; *Deery v. Cray*, 5 Wall. 795; *Alabama etc. Ins. Co. v. Boykin*, 38 Ala. 510; *Lindley v. Smith*, 46 Ill. 523; *Tubbs v. Gatewood*, 26 Ark. 128; *Payne v. Parker*, 10 Me. 178; 25 Am. Dec. 221; *Bruce v. Wood*, Met. 542; 35 Am. Dec. 380; *James v. Fisk*, 9 Smedes & M. 144; 47 Am. Dec. 111; *Purcell v. Goshorn*, 17 Ohio, 105; 49 Am. Dec. 448; *Caldwell v. Waters*,

18 Pa. St. 79; 55 Am. Dec. 593; *Morrison v. Wilson*, 13 Cal. 494; 73 Am. Dec. 593; *Dankel v. Hunter*, 61 Pa. St. 382; 100 Am. Dec. 651; *Macklay v. Love*, 25 Cal. 367; 85 Am. Dec. 133; *Reynolds v. Caldwell*, 80 Ala. 232; *Martin v. Colburn*, 88 Mo. 229.

² *Scott v. Purcell*, 7 Blackf. 66; 39 Am. Dec. 453; *Dow v. Jewell*, 18 N. H. 340; 45 Am. Dec. 371.

³ *Rogers v. Brooks*, 35 Ark. 612.

⁴ *Carr v. Williams*, 10 Ohio, 305; 36 Am. Dec. 87.

⁵ *Coal Creek Min. Co. v. Heck*, 15 Lea, 497.

⁶ *Cox v. Wells*, 7 Blackf. 410; 43 Am. Dec. 98.

⁷ *Schley v. Pullman Palace Car Co.*, 25 Fed. Rep. 890.

part of the purchase-money, and induced the purchaser to make valuable improvements.¹ The official seal of the notary is an indispensable part of his certificate of acknowledgment of a deed, and unless such seal is added, the certificate has no validity or efficacy.² Where the certificate of a married woman's acknowledgment of a deed states all that the statute requires, although it be assumed to be only *prima facie* evidence of the facts stated in it, its statements cannot be successfully impeached by evidence not clear, complete, and satisfactory.³ A proper acknowledgment subsequent to her conveyance to a second grantee will not cure a previous defective one.⁴ A wife will not be permitted to take advantage of her own irregular and wrongful acts in the acknowledgment of a deed against parties who, being ignorant of such acts, have loaned money upon the security thus acknowledged, but which is regular and fair on its face.⁵ The acknowledgment of a married woman to a mortgage is not conclusive that her consent to its execution was voluntary and free, and not induced by fear.⁶ Signing, sealing, and acknowledging a deed by a wife in which her husband purports to be the only grantor does not convey her estate.⁷ The statutory enactment that a wife cannot, without the joinder of her husband, convey real estate conveyed to her by him, or paid for by him, or given or devised to her by his relatives, does not prevent her legally leasing the premises in her name alone for a term of years.⁸ Land in Illinois belonging to a married woman may pass by a deed which, in the granting clause, does not name her husband, it being signed, sealed, and acknowledged by both.⁹ A husband cannot be compelled to join the wife in

¹ *Innis v. Templeton*, 95 Pa. St. 262; 40 Am. Rep. 643.

² *Mason v. Brock*, 12 Ill. 273; 52 Am. Dec. 490.

³ *Young v. Duvall*, 109 U. S. 573.

⁴ *Durfee v. Garvey*, 65 Cal. 406.

⁵ *McHenry v. Day*, 13 Iowa, 445; 81 Am. Dec. 438.

⁶ *Central Bank v. Copeland*, 18 Md. 305; 81 Am. Dec. 597.

⁷ *Bradley v. R. E. Co.*, 91 Mo. 493.

⁸ *Perkins v. Morse*, 78 Me. 17; 57 Am. Rep. 780.

⁹ *Schley v. Pullman Palace Car Co.*, 120 U. S. 575.

the conveyance of her separate property. The authority given him by statute to do so is purely discretionary, the exercise of which must depend entirely upon his own will.¹

ILLUSTRATIONS. — A woman, whose husband did not join in her conveyance, exchanged her land with A, and she and her husband sold the land obtained from A. *Held*, that she could not recover back the land conveyed to A, without first restoring the land received by her, or its equivalent: *O'Dell v. Little*, 82 Ky. 146. A married woman held in her maiden name real estate which belonged to her before marriage. Representing herself as a widow, and concealing her marriage, she applied for a loan thereon, and executed a mortgage therefor in her maiden name, without the husband joining in it, the other party being ignorant of her marriage. *Held*, that in equity she could not avoid the mortgage and retain the money: *Patterson v. Lawrence*, 90 Ill. 174; 32 Am. Rep. 22. A married woman exchanged lands and received a perfect deed, but gave one the certificate of acknowledgment to which was fatally defective; discovering the defect nine years thereafter, she undertook to assert her title. Meantime she had sold the lands received, and with the proceeds purchased others; and her grantee had sold part of the lands deeded by her with warranty, and made valuable improvements on the rest. *Held*, that she was estopped: *Shivers v. Simmons*, 54 Miss. 520; 28 Am. Rep. 372. The statute of Illinois provided that it should be lawful for the husband and wife to execute a deed of her real estate. A wife, without the concurrence of her husband, executed a separate deed of trust of her real estate to secure payment of a promissory note given by herself and husband for his debt. *Held*, that the deed was void. It is only in the precise mode prescribed by statute that a married woman can make a valid conveyance of land: *Bressler v. Kent*, 61 Ill. 426; 14 Am. Rep. 67.

§ 741. **Separate Examination of Wife.**— Under the statutes of many states, the officer taking the acknowledgment must examine her privily and apart from her husband, and ascertain that she executes the deed of her own free will, and without undue influence or compulsion on the part of the husband.² In some states her convey-

¹ *Stevens v. Parish*, 29 Ind. 260; 95 Am. Dec. 636. *Candleas v. Engle*, 51 Pa. St. 309; *Tapley v. Tapley*, 10 Minn. 448; 88 Am. Dec. 76.

² *Tubbs v. Gatewood*, 26 Ark. 128; *Richardson v. Hittle*, 31 Ind. 119; *Mc-*

ance, even where her husband joins, but without these statutory formalities, is void;¹ while in others, irregularities in the execution are not necessarily fatal to the instrument.² A certificate of acknowledgment by a married woman uniting with her husband in a mortgage of the homestead is liberally construed; a literal compliance with the statutory form is not required, when other words of equivalent import are used.³ Where the certificate of a married woman's acknowledgment of her deed does not contain the recital that she did not wish to retract as the statute requires, no title passes.⁴ The privy examination of a *feme covert*, which sets out that she signed the deed of her own free will and accord, and without any compulsion of her husband, is sufficient, without adding the words, "and doth voluntarily assent thereto."⁵ The deed of a married woman is void unless the certificate shows that its acknowledgment was made after she had been examined privily and apart from her husband, and had the deed fully explained to her. It is not enough that she acknowledged the deed with her husband, and that it was afterwards fully explained to her, and she declared

¹ Trimmer v. Heagy, 16 Pa. St. 484; Scarborough v. Watkins, 9 B. Mon. 540; 50 Am. Dec. 528; Dow v. Jewell, 18 N. H. 340; 45 Am. Dec. 371; Kerns v. Peeler, 4 Jones, 226; Wentworth v. Clark, 33 Ark. 432; Cincinnati v. Newell, 7 Ohio St. 37; Pratt v. Battels, 28 Vt. 685; Boyle v. Chambers, 32 Mo. 46; Berry v. Donley, 26 Tex. 737; Jewett v. Davis, 10 Allen, 68; Bressler v. Kent, 61 Ill. 426; 14 Am. Rep. 67; Baxter v. Bodkin, 25 Ind. 172; Jourdan v. Jourdan, 9 Serg. & R. 268; 11 Am. Dec. 724; Graham v. Long, 65 Pa. St. 386; Philips v. Green, 3 A. K. Marsh. 7; 13 Am. Dec. 124; Doe v. Howland, 8 Cow. 277; 18 Am. Dec. 445; Martin v. Dwelly, 6 Wend. 9; 21 Am. Dec. 245; Barnett v. Shackelford, 6 J. J. Marsh. 532; 22 Am. Dec. 100; Jamison v. Jamison, 3 Whart. 457; 31 Am. Dec. 537; Callahan v. Patterson, 4 Tex. 61; 51 Am.

Dec. 712; Grapengether v. Fejervary, 9 Iowa, 163; 74 Am. Dec. 336; Dodge v. Hollinshead, 6 Minn. 25; 80 Am. Dec. 433; Scott v. Battle, 85 N. C. 184; 39 Am. Rep. 694; Laughlin v. Fream, 14 W. Va. 322; Fisher v. Nelson, 8 Mo. App. 90; Degancraft v. Cracraft, 36 Ohio St. 549; Bartlett v. O'Donoghue, 72 Mo. 563.

² Albany Fire Ins. Co. v. Bay, 4 N. Y. 9; Card v. Patterson, 5 Ohio, 319; Smith v. Perry, 26 Vt. 279; Strickland v. Bartlett, 51 Me. 355; Hollingsworth v. McDonald, 2 Har. & J. 230; 3 Am. Dec. 545; Womack v. Womack, 8 Tex. 397; 58 Am. Dec. 119. If a married woman's mental condition was such that her privy examination could not be made, her deed is void: Garth v. Fort, 15 Lea, 683.

³ Gates v. Hester, 81 Ala. 357.

⁴ Davis v. Agnew, 67 Tex. 206.

⁵ Robbins v. Harris, 96 N. C. 557.

that she had willingly executed it, and did not wish to retract it.¹ Acknowledgment by a married woman of a deed or instrument should state that the same had been made separate and apart from her husband, and that she was examined privately touching the same.² "Separate and apart" means so far out of the presence of the husband that he cannot communicate by word, look, or motion.³ She must be a party with her husband to the conveyance, and must be privately examined at the time that the deed is executed. It is not sufficient that at a subsequent period she signs and seals a deed previously made.⁴ An officer who has properly taken a married woman's acknowledgment of her deed may perform the act of making the certificate at any time while he remains in office, provided rights of third persons do not intervene.⁵

Fraud and deception used by the husband in procuring the wife's signature, or the failure of the officer to perform his duty according to the statute form of the acknowledgment and his own certificate, will not vitiate the deed as to the grantee and those claiming under him, in the absence of evidence tending to charge him with seasonable notice thereof.⁶ And even if the deed be defectively acknowledged, a married woman who has received consideration for the sale and dealt with the property has been estopped from availing herself of the defect afterwards; so that a bill in the nature of a bill to quiet title was entertained.⁷ But duress is a good ground for avoiding the wife's deed, as against all who are chargeable with

¹ McMullen v. Egan, 21 W. Va. 233; Watson v. Michael, 21 W. Va. 568.

² Warren v. Brown, 25 Miss. 66; 57 Am. Dec. 191.

³ Belo v. Mayes, 79 Mo. 67.

⁴ Krens v. Peeler, 4 Jones, 226; 67 Am. Dec. 236.

⁵ Harmon v. Magee, 57 Miss. 410.

⁶ Pool v. Chase, 46 Tex. 207; White v. Graves, 107 Mass. 325; 9 Am. Rep. 38; Schrader v. Decker, 9 Pa. St. 14;

49 Am. Dec. 539; Singer Mfg. Co. v. Rook, 84 Pa. St. 442; 24 Am. Rep. 204.

⁷ Shivers v. Simmons, 54 Miss. 520; 28 Am. Rep. 372. In the absence of fraud charged against the grantee or the notary, a married woman will not be heard to deny her acknowledgment of a deed, and her unsupported denial does not make even a *prima facie* case: Biggers v. St. Louis etc. House-building Co., 9 Mo. App. 210.

complicity or notice.¹ Where the husband has acted unfairly or iniquitously towards his wife in inducing her to execute an instrument encumbering her separate estate to secure an individual debt of his own, he cannot join with her in a suit to repudiate such transaction, to the injury of innocent third parties. If she has a remedy, it is adversely to, and not conjointly with, her husband.² Where a wife joined with her husband in a bond to convey land, and after her husband's death received payment and invested the money in other land, she is estopped from claiming dower on the ground that she was not privily examined.³ The certificate of the officer taking an acknowledgment is conclusive as to the terms of the acknowledgment.⁴ The certificate of an officer authorized to take acknowledgments, that a married woman whose name is appended to a deed purporting to be executed by her and her husband jointly, and conveying lands owned by him, upon a separate examination duly acknowledged the execution, is conclusive as to such fact in an action by her against a *bona fide* grantee for value of such lands who has relied on such certificate, and cannot be impeached even on the ground of fraud.⁵ In any case, to impeach the truth of the certificate it will not suffice to allege that there was no privy examination, and that she did not acknowledge the execution of the instrument to be her act and deed, but there must be some facts alleged showing fraud.⁶ The evidence must be very clear that a married woman did not acknowledge a mortgage, to overcome the certificate and testimony of the notary public claiming to have taken her acknowledgment that she did.⁷ A certificate

¹ Freeman v. Wilson, 51 Miss. 329; Kennedy v. Ten Broeck, 11 Bush, 241. Louden v. Blythe, 27 Pa. St. 22; 67 Am. Dec. 442; see Michener v. Cavender, 38 Pa. St. 334; 80 Am. Dec. 486.

² Hartley v. Frosh, 6 Tex. 208; 55 Am. Dec. 772.

³ Hodges v. Powell, 96 N. C. 64; 60 Am. Rep. 401.

⁴ Petty v. Grisard, 45 Ark. 117.

⁵ Johnston v. Wallace, 53 Miss. 331; 24 Am. Rep. 699; White v. Graves, 107 Mass. 325; 9 Am. Rep. 38; Kerr v. Russell, 69 Ill. 666; 18 Am. Rep. 634.

⁶ Hartley v. Frosh, 6 Tex. 208; 55 Am. Dec. 772.

⁷ Herrick v. Musgrove, 67 Iowa, 63.

of the privy examination of a married woman is not overthrown by testimony of both husband and wife that he was present at the time, and his testimony that he does not remember whether he was within hearing or not.¹

ILLUSTRATIONS. — A certificate of acknowledgment of a married woman's conveyance, that the same was taken "separate and apart," but omitting the words "out of the presence," *held*, to be a substantial compliance with the statute, there being an averment that the contents and meaning were explained to her: *Nippel v. Hammond*, 4 Col. 211. In a certificate of acknowledgment by a married woman, a recital, "the contents of said indenture being first made fully to her," *held*, not to be rendered fatally defective by omission of the word "known": *Hornbeck v. Mutual etc. Association*, 88 Pa. St. 64. A Missouri statute required that a married woman must be made acquainted with the contents of an instrument she is to acknowledge. *Held*, that if at the time of acknowledgment she know the contents, the notary need not explain the instrument to her: *Ray v. Crouch*, 10 Mo. App. 321. A certificate of a married woman's acknowledgment that it was "apart" from her husband, *held*, good, though not reciting that it was "separate": *Belo v. Mayes*, 79 Mo. 67. An acknowledgment, with proper date and subscription, "I do further certify that on this day voluntarily appeared before me —, to me well known as the person whose name appears upon the within and foregoing deed, and in the absence of —, said husband declared that — had of her own free will executed the foregoing deed, . . . freely and without compulsion or undue influence of her husband," *held*, notwithstanding the blanks, to be a sufficient acknowledgment: *Donahue v. Mills*, 41 Ark. 421. An acknowledgment by a married woman on examination private and apart from her husband, "that she signed, sealed, and delivered the instrument of her own free will and accord, and without any force, persuasion, or threats from her said husband, and for the purposes therein stated," *held*, not a substantial compliance with a statute which requires an acknowledgment "that she signed, sealed, and delivered the instrument as her voluntary act, freely, without any fear, threats, or compulsion of her said husband": *Boykin v. Rain*, 28 Ala. 332; 65 Am. Dec. 349. A wife's acknowledgment to a conveyance of homestead, that she executed it "without fear, constraint, or persuasion of her husband," omitting "or threats," *held*, insufficient: *Motes v. Carter*, 73 Ala. 553. From 1863 to 1878 a married woman lived in meretricious relations with A, to whom, in 1873, she

¹ *Grotenkemper v. Carver*, 9 Lea, 280.

conveyed land acquired by her, and acknowledged the deed in the form applicable to single women. *Held*, that she could not avoid the deed because of the defective acknowledgment: *Hand v. Hand*, 68 Cal. 135; 58 Am. Rep. 5.

§ 742. **Tenancy by Entirety.** — Where lands are given or granted to two persons, who at the time are or thereafter become husband and wife, they become not joint tenants, but tenants by entirety.¹ This kind of tenancy is recognized in all the states,² except in Connecticut and perhaps one or two others.³ Crops raised on land owned by a husband and wife together cannot be sold on execution against the husband alone.⁴ On the death of one the survivor takes the whole.⁵ Neither one can convey or alien without the consent of the other.⁶ The married women's enabling acts have not abolished this species of tenancy,⁷ nor the statutes abolishing joint tenancies.⁸ Where land is conveyed to husband and wife, each takes an entirety, not-

¹ *Den v. Hardenbergh*, 10 N. J. L. 42; 18 Am. Dec. 371; *Doe v. Howland*, 8 Cow. 18; 277 Am. Dec. 445; *Simpson v. Pearson*, 31 Ind. 1; 99 Am. Dec. 577; *Bennett v. Child*, 19 Wis. 362; 88 Am. Dec. 692; *Davis v. Clark*; 26 Ind. 424; 89 Am. Dec. 471; *Lux v. Hoff*, 47 Ill. 425; 95 Am. Dec. 502; *Hemingway v. Scales*, 42 Miss. 1; 97 Am. Dec. 425. So where the estate is conveyed to husband and wife and a third person: *Hulett v. Inlow*, 57 Ind. 412; 26 Am. Rep. 64. Husband and wife should join in a writ of entry to recover possession of land which was conveyed to them both during their natural lives: *Wentworth v. Remick*, 47 N. H. 226; 90 Am. Dec. 573.

² See note to *Den v. Hardenbergh*, 18 Am. Dec. 377-389, where a full discussion and statement of the law may be found: *Taul v. Campbell*, 7 Yerg. 319; 27 Am. Dec. 508. Grant of land to husband and wife and a third person and their heirs, as tenants in common, and not as joint tenants, conveys one moiety to the husband and wife and the other moiety to the third person: *Johnson v. Hart*, 6 Watts & S. 319; 40 Am. Dec. 565.

³ *Den v. Hardenbergh*, 18 Am. Dec. 377-389.

⁴ *Patton v. Rankin*, 68 Ind. 245; 34 Am. Rep. 254.

⁵ *Harding v. Springer*, 14 Me. 407; 31 Am. Dec. 61; *Brounson v. Hull*, 16 Vt. 309; 42 Am. Dec. 517; *Gibson v. Zimmerman*, 12 Mo. 385; 51 Am. Dec. 168; *Ketchum v. Walsworth*, 5 Wis. 95; 68 Am. Dec. 49; *Hemingway v. Scales*, 42 Miss. 1; 97 Am. Dec. 425.

⁶ *Jackson v. McConnell*, 19 Wend. 175; 32 Am. Dec. 439; *Needham v. Branson*, 5 Ired. 426; 44 Am. Dec. 45; *Fairchild v. Chastelleux*, 1 Pa. St. 176; 44 Am. Dec. 117; *Bennett v. Child*, 19 Wis. 362; 88 Am. Dec. 692; *Davis v. Clark*, 26 Ind. 424; 89 Am. Dec. 471. The husband may mortgage or alien his interest during his own life: *Wyckoff v. Gardner*, 20 N. J. L. 556; 45 Am. Dec. 388; *Bennett v. Child*, 19 Wis. 362; 88 Am. Dec. 692.

⁷ *Bertles v. Nunan*, 92 N. Y. 152; 44 Am. Rep. 361; *Carver v. Smith*, 90 Ind. 222; 46 Am. Rep. 403; *Marburg v. Cole*, 49 Md. 402; 33 Am. Rep. 266.

⁸ *Marburg v. Cole*, 49 Md. 402; 33 Am. Rep. 266.

withstanding a statute providing that all conveyances of land made to two or more persons shall be construed to create estates in common, and not in joint tenancy.¹ Under a statute enabling married women to own real estate in the same manner as single women, a deed of lands to husband and wife still constitutes them tenants by the entirety.² Money deposited in a savings bank to the joint credit of a man and his wife is presumed to belong one half to each of them.³ A promissory note or other evidence of debt made payable to husband and wife upon the death of the husband survives to the wife, though the consideration passes from the husband, and she will take the proceeds, unless the interest of the husband's creditors is affected by reason of there not being other assets sufficient to pay his debts.⁴

• **§ 743. Wife's Separate Estate in Equity.**—At common law, as we have seen in the preceding sections, the wife was not permitted to take or enjoy any real or personal estate separate from and independently of her husband.⁵ But, on the other hand, equity considered that a married woman was capable of possessing property to her own use, independently of her husband; and the court of chancery in England gradually widened and developed this principle, until it became fully settled, that however the wife's property might be acquired, whether through contract with her husband before marriage, or by gift from him or from any stranger independently of such contract, equity would protect it, if duly set apart as her separate estate.⁶ Nor was the interposition of a trustee

¹ *Hemingway v. Scales*, 42 Miss. 1; 2 Am. Rep. 586.

² *Buttler v. Rosenblath*, 42 N. J. Eq. 651; 59 Am. Rep. 52.

³ *In re Brooks*, 5 Demarest, 326.

⁴ *Johnson v. Lusk*, 6 Coldw. 113; 98 Am. Dec. 445.

⁵ *Snell's Eq.* Personal property settled to the separate use of a married woman is free from any right or con-

trol of her then husband; but if he dies and she subsequently marries, the estate therein invests in such second husband, upon his reducing them to possession: *Miller v. Bingham*, 1 Ired. Eq. 423; 36 Am. Dec. 58.

⁶ *Schouler on Husband and Wife*, 191; *Beaufort v. Collier*, 6 Humph. 487; 44 Am. Dec. 321.

essential; the court would even hold the husband, if necessary, a trustee for her.¹ Proceeds arising from a wife's sole and separate property are to be regarded as her separate estate; so are lands purchased with such proceeds, and they are subject to the same rules as was the original estate before it was sold and converted into a different species of property.² Personal property conveyed to a trustee for the separate use of a married woman, during her life, is not liable to be taken in execution for her husband's debts.³ Property acquired by a wife while deserted by her husband is her separate estate, and she may dispose of it by will or otherwise;⁴ and so is property purchased during coverture with her separate funds.⁵ The equitable doctrine of a married woman's separate estate occupies hardly as prominent a position in the judicial reports of the United States as of those of England, though acknowledged and applied in several of the states.⁶ The legislatures, however, in this country have

¹ *Rech v. Cockell*, 9 Ves. 375; *Baron v. Barron*, 24 Vt. 375; *Steel v. Steel*, 1 Ired. Eq. 452; *Carroll v. Lee*, 3 Gill & J. 504; 22 Am. Dec. 350; *Boykin v. Ciples*, 2 Hill Ch. 200; 29 Am. Dec. 67; *Hamilton v. Bishop*, 8 Yerg. 33; 29 Am. Dec. 101. But see *Faulkner v. Falkner*, 3 Leigh, 255; 23 Am. Dec. 264.

² *Kirkpatrick v. Buford*, 21 Ark. 268; 76 Am. Dec. 363; *Martin v. Colburn*, 88 Mo. 229.

³ *Sharp v. Wickliffe*, 3 Litt. 10; 14 Am. Dec. 37.

⁴ *Starrett v. Wynn*, 17 Serg. & R. 130; 17 Am. Dec. 654.

⁵ *Ramsdell v. Fuller*, 28 Cal. 37; 87 Am. Dec. 103.

⁶ Mr. Schouler, in his excellent work on husband and wife, points this out (section 204). "In the New England states," he says, "scarcely a vestige of the separate use was to be found. New York, with such eminent chancellors as Kent and Walworth, took the lead in building up an equity system parallel with that of England; and in the reports of this state are to be found most of the leading cases,

and the ablest discussions of what may be termed American chancery doctrines. New Jersey recognized the separate use, and her chancery court exercised liberal powers. In Pennsylvania, the doctrine was recognized to some extent. The courts of Maryland, Virginia, and the southern states generally, had frequent occasion to try the separate-use doctrine; none more than those of North and South Carolina. And it may be remarked that the aristocratic element of society in that section of the country, also a prevalent disposition for family entails, marriage settlements, and fetters upon the transmission of landed property, aided much in developing therein the English chancery system. So was it in Kentucky and Tennessee, states founded upon like institutions. But as to Ohio, Indiana, Illinois, and the other states erected from what was formerly known as the Northwest Territory, society was modeled more after New England, and we find no clear recognition of the wife's equitable separate use. Louisiana, and such contiguous states as

amply supplied any omissions on the part of the courts in this respect.

ILLUSTRATIONS.—Real estate was bought by a woman with her own means, and before marriage conveyed to a trustee to hold for her and be conveyed upon her written request. *Held*, to be her separate property; and a conveyance by herself and husband to a third person, to pass her equitable title, and be a sufficient request to the trustee to convey the legal title to the grantee: *Knowles v. Knowles*, 86 Ill. 1. The wife held certain leasehold estates, partly owned by her before marriage, and partly purchased afterwards with her own money. During her coverture, she paid the ground-rent and taxes, and collected and deposited, in her own name, the moneys derived from the leaseholds; and the husband deserted her during the marriage, and never returned to her. *Held*, that such money must be treated as her separate property, and that after her death the husband could not retain it against her separate heirs: *Coughlin v. Ryan*, 43 Mo. 99; 97 Am. Dec. 375.

§ 744. What Words in Instruments Sufficient to Create Separate Estate.—It was, however, essential in equity that the property conveyed or devised to the wife, in order to be held by her as separate estate, should have been so conveyed or devised with the intention of being held by her as her separate property. Therefore the courts looked at the intention, and no particular form of words was necessary to create it.¹ The words designated

were originally governed by French and Spanish laws, had more or less of the civil or community system; and to these states English equity maxims had at best only a limited application. Such, then, is the wife's separate use, viewed in the light of judicial precedents, as known in the United States, until very nearly the middle of the nineteenth century"; citing U. S. Eq. Dig., tit. Husband and Wife, 12; *Reade v. Livingston*, 3 Johns. Ch. 481; 8 Am. Dec. 520; *Methodist Ep. Church v. Jaques*, 1 Johns. Ch. 65; *Rogers v. Rogers*, 4 Paige, 516; 27 Am. Dec. 84; *Vernon v. Marsh*, 4 N. J. Eq. 502; *Steel v. Steel*, 1 Ired. Eq. 452; *Jackson v. McAliley*, Spears Eq. 303; 40 Am. Dec. 620; *Boykin v. Ciples*, 2 Hill Ch. 200; 29 Am. Dec. 67; *Hunt*

v. Booth, 1 Freem. Ch. 215; *Warren v. Haley*, 1 Smedes & M. Ch. 647; *Hamilton v. Bishop*, 8 Yerg. 33; 29 Am. Dec. 101; *Griffith v. Griffith*, 5 B. Mon. 113; *McKenna v. Phillips*, 6 Whart. 571; 37 Am. Dec. 438; *Gray v. Crook*, 12 Gill & J. 236; *Howard v. Menifee*, 5 Ark. 668.

¹ *Nix v. Bradley*, 6 Rich. Eq. 48; *Schouler on Husband and Wife*, 192; *Martin v. Bell*, 9 Rich. Eq. 42; 70 Am. Dec. 200; *Gaines v. Poor*, 3 Met. (Ky.) 503; 79 Am. Dec. 559; *Magill v. Trust Co.*, 81 Ky. 129; *Duke v. Duke*, 81 Ky. 308; *Fox v. Jones*, 1 W. Va. 205; 91 Am. Dec. 383; *Clark v. Peck*, 41 Vt. 145; 98 Am. Dec. 573; *Robinson v. Randolph*, 21 Fla. 629; 58 Am. Rep. 692.

to create a separate estate for a married woman need not appear in the granting clause or in the *habendum* clause of the deed.¹ Thus the following expressions have been held sufficient in a gift or settlement to vest the property in her for her separate use, viz.: "for her own use, and at her own disposal";² "for her own use, independent of her husband";³ "for her own use and benefit, independent of any other person";⁴ "that she should receive and enjoy the issue and profits";⁵ "for her use, maintenance, and support";⁶ "for her own use";⁷ "for her sole use, benefit, and behoof";⁸ "for her sole and separate use";⁹ "for her use";¹⁰ "for her own proper use and benefit";¹¹ "exclusively";¹² "for her use and benefit";¹³ "for her sole use and benefit";¹⁴ "with complete control of it as though the marriage had never taken place";¹⁵ "for her separate use and benefit";¹⁶ "in no wise subject to the debts of her husband";¹⁷ "to have, manage, and dispose of at her will and pleasure";¹⁸ "as her separate estate as if she were unmarried."¹⁹ On the other hand, it is no less firmly established that courts of equity will not deprive the husband of his rights at law, except by words which leave no doubt of the intention to exclude him. It has been held, therefore, that no separate use was created where there was a mere direction "to pay a married woman and her assigns";²⁰

¹ *Morrison v. Thistle*, 67 Mo. 596.

² *Inglefield v. Coghlan*, 2 Coll. 247.

³ *Wagstaff v. Smith*, 9 Ves. 520.

⁴ *Glover v. Hall*, 16 Sim. 568; *Pepper v. Lee*, 53 Ala. 33; *Williams v. Maull*, 20 Ala. 721.

⁵ *Tyrell v. Hope*, 2 Atk. 558.

⁶ *Good v. Harria*, 2 Ired. Eq. 630.

⁷ *Jamison v. Brady*, 6 Serg. & R. 466; 9 Am. Dec. 460.

⁸ *Williman v. Holmes*, 4 Rich. Eq. 479.

⁹ *Parker v. Brooke*, 9 Ves. 583; *Robinson v. O'Neil*, 56 Ala. 541; *Swain v. Duane*, 52 Ala. 456; *Bridges v. Phillips*, 25 Ala. 136; 60 Am. Dec. 495.

¹⁰ *Steel v. Steel*, 1 Ired. Eq. 452.

¹¹ *Griffith v. Griffith*, 5 B. Mon. 113.

¹² *Gould v. Hill*, 18 Ala. 84.

¹³ *Hamilton v. Bishop*, 8 Yerg. 33; 29 Am. Dec. 101.

¹⁴ *Smith v. Wells*, 7 Met. 240; 39 Am. Dec. 772; *Perdue v. Montgomery Building Ass'n*, 79 Ala. 478.

¹⁵ *Bradford v. Greenway*, 17 Ala. 797; 52 Am. Dec. 203.

¹⁶ *Sweeney v. Smith*, 15 B. Mon. 325; 61 Am. Dec. 188.

¹⁷ *Martin v. Bell*, 9 Rich. Eq. 42; 70 Am. Dec. 200; *Kempton v. Hallowell*, 24 Ga. 52; 71 Am. Dec. 112; *Keaton v. Scott*, 25 Ga. 652; 71 Am. Dec. 197.

¹⁸ *English v. Beehle*, 32 Mo. 186; 82 Am. Dec. 126.

¹⁹ *Cardwell v. Perry*, 82 Ky. 129.

²⁰ *Lumb v. Milnes*, 5 Ves. 517.

or where there was a gift "to her own use and benefit";¹ or to her "absolute use";² or when payment was directed to be made "into her own proper hands, to and for her own use and benefit";³ or when property was given "to be under her sole control";⁴ or "to be freely enjoyed by her as her own";⁵ "to the use, benefit, and behoof of husband and wife";⁶ "to her only proper use and behoof."⁷

ILLUSTRATIONS.—A marriage settlement entered into by the husband and wife secured the wife's separate property to her, but did not declare it to be for her separate use. *Held*, that the husband was entitled to the use of the property: *Barrett v. Barrett*, 4 Desaus. 447. A will merely indicated a purpose that the testator's three married daughters "enjoy the respective portions herein devised to them as they see fit." *Held*, insufficient to cut off the marital rights of their husbands: *Wood v. Polk*, 12 Heisk. 220. A bequest of property in trust "for the use and benefit of" a married woman, "to pay the income thereof annually" to her, *held*, not to vest in her a separate estate free from marital control: *Vail v. Vail*, 49 Conn. 52. A conveyance to a trustee for mutual support of husband and wife provided that the profits, uses, and issues of the property conveyed be paid to them "for their joint maintenance during their natural lives, or to the survivor of them during the time of his or her natural life." *Held*, not to exclude the marital rights of the husband: *Moss v. McCall*, 12 Ala. 630; 46 Am. Dec. 272. A will provided for the loan to the testator's daughter of certain land for life, and for her sole and separate use and benefit, not subject to her husband's debts, not to be sold from her as a life estate, but to remain in her possession for life, to enable her to raise and educate her children, and to be divided among them after her death. *Held*, that her life estate could be levied on for her debts: *Mathews v. Paradise*, 74 Ga. 523. A made a deed of gift to his mother-in-law, who had a husband. The consideration was "love and esteem," and the gift was specified to be for her "better maintenance, livelihood, and support." The grantor bought the land from the donee's husband. *Held*, that the effect of the deed was to create in the donee a separate estate: *Dunbar v. Mize*, 74 Ga. 130.

¹ *Kensington v. Dollond*, 2 Mylne & K. 184; *Tennant v. Stoney*, 1 Rich. Eq. 222; 44 Am. Dec. 213.

² *Ex parte Abbott*, 1 Deacon, 338; *Houston v. Embry*, 1 Sneed, 481.

³ *Tyler v. Lake*, 2 Russ. & M. 183.

⁴ *Massey v. Parker*, 2 Mylne & K. 174.

⁵ *Wilson v. Bailer*, 3 Stroob. Eq. 258; 51 Am. Dec. 678.

⁶ *Sanderson v. Jones*, 6 Fla. 430; 63 Am. Dec. 217.

⁷ *Bason v. Holt*, 2 Jones, 323; 64 Am. Dec. 585.

§ 745. **Restraint on Anticipation.**—When first property was permitted to be settled to the separate use of a married woman, equity viewed her as a *feme sole* to the extent of having dominion over the property. It was, however, soon found that this concession to the requirements of justice, though useful and operative in securing to her a dominion over the estate so devoted to her support, was open to the difficulty, that she, being at liberty to dispose of it (as a *feme sole* might have disposed of it), was nevertheless exposed to the persuasion or other mode of influence of her husband, which was often found to defeat the very purpose for which her separate property was given her. To meet, therefore, this further difficulty, a provision was adopted of prohibiting the anticipation of the income, so that the wife should have no dominion over it till the payments actually became due.¹ Like the separate use itself, this clause of restraint on anticipation exists only in the marriage state; and property vested in a single woman she may dispose of absolutely, despite such limitation, so long as she remains unmarried; but upon her coverture, while retaining such property, the separate use and the restraint upon anticipation attach and become effective together, cease together upon her widowhood, and revive together upon her remarriage.²

§ 746. **Wife's Statutory Separate Estate.**—Within late years in the United States, statutes have been passed in almost if not all of the states, giving to the wife a separate estate. These statutes, though somewhat varied in their provisions, all seek one end; viz., the right of a married woman to have her own property. They provide generally that the real and personal property of a woman owned by her on her marriage shall remain her separate

¹ Snell's Eq. 333; *Kempton v. Hallowell*, 24 Ga. 52; 71 Am. Dec. 112.

² *Tullett v. Armstrong*, 1 Beav. 1; *Smith v. Starr*, 3 Whart. 62; 31 Am. Dec. 498. The above rule in *Tullett v. Armstrong* has been adopted in this

country, except in the states of Pennsylvania, Arkansas, and North Carolina: See *Hamersley v. Smith*, 4 Whart. 126; *Lindsay v. Harrison*, 8 Ark. 311; *Apple v. Allen*, 3 Jones Eq. 120.

property, free from the interference or control of her husband; that all real property acquired after marriage by the wife, either by devise or descent, by purchase or gift, by her own labor, or by any other manner, shall remain her sole and separate property; that all personal property acquired in the same manner shall follow the same rule.¹ A married woman's property is presumed to belong to her statutory rather than to her equitable estate.² A married woman's possession of chattels is not *prima facie* evidence of her ownership.³ Chattels, the separate property of the wife abroad, and brought by her to this country, remain her separate property, until by her own acts she divests herself of her rights.⁴ A statutory power to a married woman to "sell and convey" her lands as if unmarried authorizes her to lease them; and she may lease them in conjunction with her husband, and sue alone on rent notes payable to herself.⁵ A married woman may maintain an action in her own name for personal injuries, under a statute providing that "all property which any married woman during coverture acquires shall be and remain her sole and separate property," on the ground that such a right of action is her "separate property"; but if the action is commenced by the husband and wife jointly, an agreement made by him, with her consent, to withdraw the suit for a specified sum, will be binding on her, and bar a subsequent separate action by her.⁶ Where a statute gave a widow a right of action for the homicide of her husband, it was held that the right was not divested by the subsequent marriage of the widow, and that such subsequent marriage would not affect the measure of damages.⁷ A husband does not acquire title to products

¹ See the statutes indexed in 1 Stimson's Statute Law, secs. 6420 et seq. And see a summary of them in note to Kirkpatrick v. Buford, 21 Ark. 268, in 76 Am. Dec. 367-401.

² Steed v. Knowles, 79 Ala. 446.

³ McFerran v. Kinney, 22 Mo. App. 554.

⁴ State v. Chatham Bank, 80 Mo. 626.

⁵ Warren v. Wagner, 75 Ala. 188; 51 Am. Rep. 446.

⁶ Chicago etc. R. R. Co. v. Dunn, 52 Ill. 260; 4 Am. Rep. 606.

⁷ Georgia R. R. Co. v. Garr, 57 Ga. 277; 24 Am. Rep. 492.

of his wife's farm merely by the labor which he voluntarily bestows upon it, where he is permitted, in the enjoyment of the marital relation, to live and be maintained upon the farm which the wife manages for her own use.¹ A married woman's contention that she, and not her husband, is the real owner of a valuable stallion, which his creditors seek to appropriate, is not improbable by reason of the nature of the property.²

ILLUSTRATIONS.—Land was devised in trust for the sole, separate, and exclusive use of a married woman and her children, she to receive the rents, which were to be subject to her control and disposition as if she were a *feme sole*. *Held*, that her estate was not an equitable, but a statutory, estate: *Kellogg v. Kellogg*, 63 Miss. 631.

§ 747. Married Woman not Liable at Common Law on her Contracts.—At common law, a married woman is not capable of making a valid contract, and is not liable on such contracts as she may enter into.³ "To illustrate the wife's disability," says Mr. Schouler,⁴ "she cannot earn money for herself.⁵ She cannot, jointly with her husband or alone, sign or indorse a promissory note so as to bind herself;⁶ nor execute a bond or other instrument under seal;⁷ nor purchase on her own credit; nor agree to keep a money deposit payable on demand; nor be surety for another;⁸ nor otherwise make a valid contract.⁹ She is

¹ *Rush v. Vought*, 55 Pa. St. 437; 93 Am. Dec. 769.

² *Vandercook v. Gere*, 69 Iowa, 467.

³ *Burton v. Marshall*, 4 Gill, 487; 45 Am. Dec. 171; *Palmer v. Oakley*, 2 Doug. (Mich.) 433; 47 Am. Dec. 41; *Harris v. Taylor*, 3 Sneed, 536; 67 Am. Dec. 577. A married woman in California is incapable of contracting a personal obligation, except in certain special cases provided by statute; her uniting in the execution of such obligation with her husband will not render it any more than his individual obligation: *Norton v. Meader*, 4 Saw. 603.

⁴ *Schouler on Husband and Wife*, sec. 98.

⁵ *Offley v. Clay*, 2 Man. & Gr. 172.

⁶ *Mason v. Morgan*, 2 Ad. & El. 30; *Snider v. Ridgeway*, 49 Ill. 522; *O'Daily v. Morris*, 31 Ind. 111; *Dollner v. Snow*, 16 Fla. 86; *Robertson v. Wilburn*, 1 Lea, 633; *Brown v. Orr*, 29 Cal. 120; *Tracy v. Keith*, 11 Allen, 214.

⁷ *Whitworth v. Carter*, 43 Miss. 61; *Huntley v. Whitner*, 77 N. C. 392.

⁸ *Swing v. Woodruff*, 41 N. J. L. 469; *Gosman v. Kruger*, 69 N. Y. 87; 25 Am. Rep. 141.

⁹ *Avery v. Griffin*, L. R. 6 Eq. 606; *Tobey v. Smith*, 15 Gray, 535; *Goulding v. Davidson*, 23 Barb. 438; *Lee v. Lanahan*, 58 Me. 478. Her judgment bond is void: *Schlosser's Appeal*, 58

permitted, as we shall hereafter see, to pass her real estate by joining in a deed with her husband; but when she does so, she is not bound by her covenants, nor was her separate conveyance (except by some matter of record) of any effect whatsoever.¹ Her covenant in a mortgage of her husband's property,² or title bond, or executory contract to convey land,³ is equally ineffectual. A sheriff's sale of her land upon her judgment note, given as security for her husband, may be set aside as void.⁴ In all these cases, the wife is considered as under the husband's dominion, and unable to act for herself.⁵ On the same principle, it is held that a married woman cannot bind herself by her contract to convey estate which is devised to her in trust for sale.⁶ The executory and unacknowledged contract of a married woman, being void as a contract, cannot be supported as against her on the ground of estoppel.⁷ A wife is not bound by her warranty, nor by the covenants contained in her deed.⁸ The law confers on a wife power to contract and sue as *feme sole*, where her husband leaves the state, with intent to abandon her and not to return, and remains absent therefrom more than five years.⁹

Pa. St. 493. Likewise her warrant of attorney to confess judgment: *Swing v. Woodruff*, 41 N. J. L. 469; *Shallcross v. Smith*, 81 Pa. St. 32. But as to rights of property acquired by a married woman on the faith of a promise which she voluntarily performed, see *Walker v. Coover*, 65 Pa. St. 430.

¹ 2 Bla. Com. 293, 351, 364; *Robinson v. Robinson*, 11 Bush, 174; *Ferguson v. Reed*, 45 Tex. 574; *Botsford v. Wilson*, 75 Ill. 133; 2 Kent's Com. 150-154, 167, 168; *Ela v. Card*, 2 N. H. 175; 9 Am. Dec. 46.

² *Kitchell v. Mudgett*, 37 Mich. 81.

³ *Stidham v. Matthews*, 29 Ark. 650; *Oglesby Coal Co. v. Pasco*, 79 Ill. 164.

⁴ *Doyle v. Kelly*, 75 Ill. 574.

⁵ *Marshall v. Rutton*, 8 Term Rep. 545; 11 East, 301; 2 Bos. & P. 226; 3 Barn. & C. 291; *Jackson v. Vanderheyden*, 17 Johns. 167; 8 Am. Dec. 378; *Benjamin v. Benjamin*, 15 Conn. 347; 38 Am. Dec. 384; *Ayer v. Warren*, 47 Me. 217; *Young v. Paul*, 10 N.

J. Eq. 401; 64 Am. Dec. 456; *Stillwell v. Adams*, 29 Ark. 346; *Stockton v. Farley*, 10 W. Va. 171; 27 Am. Rep. 566; *Savage v. Davis*, 18 Wis. 608; *Williams v. Coward*, 1 Grant Cas. 21.

⁶ *Avery v. Griffin*, L. R. 6 Eq. 606.

⁷ *Wood v. Terry*, 30 Ark. 385; *Oglesby Coal Co. v. Pasco*, 79 Ill. 164. But see *Norton v. Nichols*, 35 Mich. 148.

⁸ 2 Kent's Com. 167, 168; *Fowler v. Shearer*, 7 Mass. 21; *Falmouth Bridge Co. v. Tibbetts*, 16 B. Mon. 637; *Den v. Demarest*, 21 N. J. L. 525; *Botsford v. Wilson*, 75 Ill. 133; *Nash v. Spoford*, 10 Met. 192; 53 Am. Dec. 425; *Jackson v. Vanderheyden*, 17 Johns. 167; 8 Am. Dec. 378; *Foster v. Wilcox*, 10 R. I. 443; 14 Am. Rep. 698; *Dean v. Shelly*, 57 Pa. St. 426; 98 Am. Dec. 235; *Hyde v. Warren*, 46 Miss. 13; *Wadleigh v. Glines*, 6 N. H. 17; 23 Am. Dec. 705; *Childs v. McChesney*, 20 Iowa, 431; 89 Am. Dec. 545.

⁹ *Mead v. Hughes*, 15 Ala. 141; 50 Am. Dec. 123.

And where a husband compels a wife without her fault to live separate from him permanently, either by abandoning her or forcing her to leave him, and fails to make suitable provision for her support, she may acquire property, control her person and acquisitions, contract, sue, and be sued in relation to them as *feme sole*, during the continuance of such condition.¹ But the husband's frequent protracted absence, and the practice of his wife to transact business as a *feme sole*, does not remove her disability to contract, unless her husband was dead in law.²

ILLUSTRATIONS. — In an action on a bill of exchange accepted by a married woman in payment for property purchased by her, the defendant pleaded coverture at the date of the acceptance; replication, that defendant, after her husband's death, promised to pay the bill. *Held*, that the replication was bad; the acceptance being void when made, there was no consideration for the subsequent promise: *Porterfield v. Butler*, 47 Miss. 165; 12 Am. Rep. 329. A married woman, by the terms of a deed to her, assumed and agreed to pay a mortgage existing upon the conveyed premises. *Held*, that this made her personally liable for the mortgage debt, and that her grantee, in like manner assuming the mortgage, was likewise liable, and a judgment against him for deficiency on foreclosure was proper: *Cashman v. Henry*, 75 N. Y. 103; 31 Am. Rep. 437; *Brewer v. Maurer*, 38 Ohio St. 543; 43 Am. Rep. 436.

§ 748. **Different Rule in Equity — Married Woman Bound.** — The English courts of chancery, though granting and recognizing the separate estate of a married woman, for a long period refused to grant her the power of contracting debts or making contracts which would bind her separate property. Eventually, however, being pressed by the injustice of allowing her, after having solemnly and deliberately entered into an engagement for the payment of money, to continue in the enjoyment of her separate property without paying her creditors, the courts at first ventured so far as to hold, that if she made a contract for

¹ *Love v. Moynahan*, 16 Ill. 277; 63 Am. Dec. 307.

² *Rogers v. Phillips*, 8 Ark. 366; 47 Am. Dec. 727.

payment of money by a written instrument, with a certain degree of formality and solemnity, as by a bond under her hand and seal,¹ in that case, the property settled to her separate use should be made liable to the payment of it; and this principle—if principle it could be called—was subsequently extended to instruments of a less formal character, such as to bills of exchange,² or promissory notes,³ and ultimately to any written agreement.⁴ But for many years the courts stopped here, and refused to extend the rule to verbal agreements. This distinction, however, is at length swept away, and the rule in England is as expressed by the vice-chancellor in *Matthewman's case*.⁵ “It clearly is not necessary that the contract should be in writing, because it is now admitted that if a married woman enters into a verbal engagement, expressly making her estate liable, such contract would bind it; nor is it necessary that there should be an express reference made to the fact of there being such separate estate, for a bond or promissory note given by a married woman, without any mention of her separate estate, has long been held sufficient to make her separate estate liable, provided she be not restrained from anticipation. If the circumstances are such as to lead to the conclusion that she was contracting, not for her husband, but for herself, in respect to her separate estate, that separate estate will be liable to satisfy the obligation.” In the United States, the English rule as to the power of a married woman over her separate estate, and its liability for her contracts, has been generally followed. “Unless specially restrained by the instrument creating the separate estate, a married woman is, with respect to that estate, a *feme sole* in equity, and may dispose of the

¹ Snell's Eq. 328; *Hulme v. Tenant*, 1 Smith's Lead. Cas. 525; *Heatley v. Thomas*, 15 Ves. 596.

² *Stuart v. Kirkwall*, 3 Madd. 387; *Owen v. Homan*, 4 H. L. Cas. 997; *M'Henry v. Davies*, L. R. 10 Eq. 88.

³ *Bulpin v. Clarke*, 17 Ves. 365; *Field v. Sowle*, 4 Russ. 112.

⁴ *Master v. Fuller*, 1 Ves. Jr. 513; *Murray v. Barlee*, 5 Mylne & K. 209; *Picard v. Hine*, L. R. 5 Ch. App. 274. ⁵ L. R. 3 Eq. 787.

estate in any way she please; and a specification in the deed of settlement of particular modes in which she may dispose of the estate will not of itself restrain her from disposing of it in any other manner."¹ This rule has been followed in the federal courts, and in the courts of all the states except South Carolina,² Pennsylvania,³ Alabama,⁴ Illinois,⁵ Rhode Island,⁶ Mississippi,⁷ Tennessee,⁸ and perhaps Ohio.⁹

§ 749. Statutory Separate Estate — Power of Wife to Bind It. — In most of the states, to charge the statutory separate estate with her debts, the wife must have indicated her intention to charge the estate, or the debt be contracted for the benefit of the separate estate, or for her own benefit upon the credit of the separate estate.¹⁰ In Kentucky and Ohio, to render the separate estate liable, the wife must intend to bind it, but such intent may be implied from her giving, signing, or indorsing a promis-

¹ *Jaques v. Methodist Episcopal Church*, 17 Johns. 548; 8 Am. Dec. 447; *Harris v. Harris*, 7 Ired. Eq. 111; 53 Am. Dec. 393; *Patton v. Bank*, 12 W. Va. 587; *Radford v. Carwile*, 13 W. Va. 572; *Johnson v. Cummins*, 16 N. J. Eq. 97; 64 Am. Dec. 142; *Rogers v. Ward*, 8 Allen, 387; 85 Am. Dec. 711.

² *Ewing v. Smith*, 3 Desaus. 417; 5 Am. Dec. 557; *Reid v. Lamar*, 1 Strob. Eq. 27; *Robinson v. Dart*, *Dud. Eq.* 128; 31 Am. Dec. 569; *Calhoun v. Calhoun*, 2 Strob. Eq. 231; 49 Am. Dec. 667.

³ *Lancaster v. Dolan*, 1 Rawle, 231; 18 Am. Dec. 625; *West v. West*, 10 Serg. & R. 445; *Jones's Appeal*, 57 Pa. St. 367; *Thomas v. Folwell*, 2 Whart. 11; 30 Am. Dec. 230.

⁴ *Short v. Battle*, 52 Ala. 456.

⁵ *Cookson v. Toole*, 56 Ill. 515; *Bressler v. Kent*, 61 Ill. 426; 14 Am. Rep. 67.

⁶ *Metcalf v. Cook*, 2 R. I. 355.

⁷ *Doty v. Mitchell*, 9 Smedes & M. 435.

⁸ *Marshall v. Stephens*, 8 Humph. 159; 47 Am. Dec. 601; *Laird v. Scott*, 5 Heisk. 350; *Deadrick v. Armour*, 10 Humph. 596; *Litton v. Baldwin*; 8 Humph. 209; 47 Am. Dec. 603.

⁹ *Macher v. Burroughs*, 14 Ohio St. 519.

¹⁰ *M. E. Church v. Jaques*, 3 Johns. Ch. 77; 17 Johns. 549; 8 Am. Dec. 447; *Vanderheyden v. Mallory*, 1 N. Y. 462; *Yale v. Dederer*, 21 Barb. 286; *Yale v. Dederer*, 18 N. Y. 265; 72 Am. Dec. 503; *Yale v. Dederer*, 22 N. Y. 451; 78 Am. Dec. 216; *Yale v. Dederer*, 68 N. Y. 329; *Manhattan B. & M. Co. v. Thompson*, 58 N. Y. 80; *White v. McNett*, 33 N. Y. 371; *Conlin v. Cantrell*, 64 N. Y. 217; *Willard v. Eastham*, 15 Gray, 328; 77 Am. Dec. 366; *Rogers v. Ward*, 8 Allen, 387; 85 Am. Dec. 710; *Dyett v. Coal Co.*, 20 Wend. 570; 32 Am. Dec. 598; *Dickson v. Miller*, 11 Smedes & M. 594; 49 Am. Dec. 71; *Dobbin v. Hubbard*, 17 Ark. 189; 65 Am. Dec. 425; *Phillips v. Graves*, 22 Ohio St. 371; 5 Am. Rep. 489; *Williams v. Hugunin*, 69 Ill. 214; 18 Am. Rep. 607; *Corn Exchange Co. v. Babcock*, 42 N. Y. 613; 1 Am. Rep. 60; *Elliot v. Gower*, 12 R. I. 79; 34 Am. Rep. 600; *Dale v. Robinson*, 51 Vt. 30; 31 Am. Rep. 669; *Kantrowitz v. Prather*, 31 Ind. 92; 99 Am. Dec. 587.

sory note.¹ In New Jersey, the separate estate is liable for the payment of all her debts, made on the faith and credit of the estate, whether charged on her estate or not, if contracted for her benefit, but it is not in any case liable for a security debt.² In North Carolina, the separate estate is liable for any debt contracted with the express or implied intent that it should be paid out of such estate, although some cases indicate a restriction on this.³ In Maryland, parol testimony is admissible to prove the intent when the debt is evidenced by writing.⁴ In Alabama and Missouri, a *feme covert* may contract in the same manner as a *feme sole*, and her contracts, whether verbal, written, express, or implied, are all binding on her separate estate without regard to her intentions, as they do not bind the estate as appointments, nor are regarded as charges under her *jus disponendi*, but on the ground, as in England, that the liability is incident to ownership.⁵ In Connecticut, a *feme covert* can dispose of her estate as a *feme sole*, unless restricted in the grant, and it may be inferred that it is liable for all her debts.⁶ In Wisconsin, if a married woman contracts on the faith and credit of her separate estate, it is liable therefor, though no charge be made by her, either expressly or impliedly.⁷ In California, the separate estate is liable for the debts when she has expressly or

¹ Coleman v. Wooley, 10 B. Mon. 320; Jarman v. Wilkerson, 7 B. Mon. 293; Bell v. Kellar, 13 B. Mon. 383; Burch v. Breckinridge, 16 B. Mon. 482; 63 Am. Dec. 553; Phillips v. Graves, 20 Ohio St. 371; 5 Am. Rep. 675.

² Leacycraft v. Hedden, 4 N. J. Eq. 512; Johnson v. Cummins, 16 N. J. Eq. 104; 84 Am. Dec. 142; Armstrong v. Ross, 20 N. J. Eq. 109; Perkins v. Elliott, 23 N. J. Eq. 526.

³ Frazier v. Brownlow, 3 Ired. Eq. 237; 42 Am. Dec. 165; Knox v. Jordan, 5 Jones Eq. 175; Felton v. Reid, 7 Jones, 269; Leigh v. Smith, 3 Ired. Eq. 244; 42 Am. Dec. 182; Rogers v. Hinton, Phill. Eq. 101; Bank v. Hanover, 98 N. C. 67; 2 Am. St. Rep. 317.

⁴ Gray v. Crook, 12 Gill & J. 236;

Conn v. Conn, 1 Md. Ch. 218; Koontz v. Nabb, 16 Md. 549.

⁵ Ozley v. Ikelheimer, 26 Ala. 332; Caldwell v. Sawyer, 30 Ala. 285; Walker v. Smith, 28 Ala. 569; Collins v. Rudolph, 19 Ala. 616; Gunn v. Samuels's Adm'r, 33 Ala. 201; Cowles v. Morgan, 34 Ala. 535; Coats v. Robinson, 10 Mo. 757; Whitesides v. Cannon, 23 Mo. 457; Claflin v. Van Wagener, 32 Mo. 252; Schafroth v. Ambs, 46 Mo. 114; Miller v. Brown, 47 Mo. 504; 4 Am. Rep. 345; Kimm v. Weipert, 46 Mo. 532; 2 Am. Rep. 541.

⁶ Imlay v. Huntington, 20 Conn. 173; Leavitt v. Beirne, 21 Conn. 1; Taylor v. Shelton, 30 Conn. 127.

⁷ Todd v. Lee, 15 Wis. 365; 16 Wis.

506.

impliedly charged them on her estate.¹ The same is the law of Minnesota.² Georgia³ and Vermont require an intention to charge the estate.⁴ In Virginia, the estate is liable for all the wife's debts.⁵ In Tennessee, the agreement or intention to charge her separate estate must be express.⁶

A married woman's separate estate is liable for repairs made at her request, and for which she has promised to pay.⁷ She is liable upon her promissory note given for an overdraft of her bank account;⁸ for the costs of an action brought by her alone to recover property claimed to belong to it.⁹ She may, with her husband, mortgage her own lands to secure the payment of his debts or those of any other person, for the payment of which she is in no way liable.¹⁰ A married woman having a separate estate may charge the same in equity by the execution of a promissory note as surety for her husband or another, without express words of charge.¹¹ A married woman may bind her separate estate by a contract for compensation of an attorney at law for his services in defending her interests in a legal proceeding in reference thereto, or affecting the same, although the enabling statutes do not expressly authorize such employment.¹² A contract made by a married woman in compromise of a claim against an estate in which she is entitled to a distributive share is one in respect to her separate estate, and binding on her.¹³ Unless forbidden by statute, a wife may pledge a policy

¹ *Miller v. Newton*, 23 Cal. 569.

² *Pond v. Carpenter*, 12 Minn. 432.

³ *Dallas v. Heard*, 32 Ga. 604.

⁴ *Partridge v. Stocker*, 36 Vt. 117; 84 Am. Dec. 664.

⁵ *West v. West*, 3 Rand. 373; *Vizonnean v. Pegram*, 2 Leigh, 185; *Williamson v. Beckham*, 8 Leigh, 20; *Woodson v. Perkins*, 5 Gratt. 345; *Nixon v. Rose*, 12 Gratt. 431; *Penn v. Whitehead*, 17 Gratt. 503; 94 Am. Dec. 478; *Darnall v. Smith*, 26 Gratt. 878.

⁶ *Litton v. Baldwin*, 8 Humph. 290; 47 Am. Dec. 605.

⁷ *Allen v. Graham*, 12 Phila. 176.

⁸ *Davis v. First National Bank of Cheyenne*, 5 Neb. 242; 25 Am. Rep. 484.

⁹ *Askew v. Renfroe*, 81 Ala. 360.

¹⁰ *Merchant v. Thompson*, 34 N. J. Eq. 73.

¹¹ *Williams v. Urmston*, 35 Ohio St. 296; 35 Am. Rep. 611.

¹² *Porter v. Haley*, 55 Miss. 66; 30 Am. Rep. 502.

¹³ *Husband v. Epling*, 81 Ill. 172; 25 Am. Rep. 273.

of insurance issued on her husband's life for her benefit, as security for his debt evidenced by his note, and a renewal of the note will not discharge the creditor's claim on the policy.¹ A married woman selling her separate stock of millinery goods, and the good-will of the business, may bind herself by her engagement not to carry on that business at that place, or within such a distance as would interfere with it.² Where she purchases goods for herself in her own name and on her own credit, the law will presume that she intends to charge her separate estate, although the goods may be necessities which the husband is bound to furnish, and although the agreement is verbal.³ A written promise by a widow to pay her note given when married, for the benefit of her separate estate, is binding.⁴ A married woman is not liable as surety upon a guardian's bond, in which there is no expression of intention to charge her separate estate, although it is executed in compliance with an order of court, and accompanied by her affidavit that she possessed the requisite amount of estate.⁵ She is not liable on her indorsement of a note transferred by her to secure the debt of a corporation in which she is a stockholder.⁶ The Missouri act of 1875, enlarging the powers of married women, confers on a married woman who purchases personal property with her own means and on her own credit power to charge it by her note secured by her deed of trust thereon, for the payment of the purchase price.⁷ The power conferred by statute on a married woman to contract with relation to her separate property does not authorize her to sign as surety a note made by her husband.⁸ Under the New Hampshire statute, a wife

¹ *Collins v. Dawley*, 4 Col. 138; 34 Am. Rep. 72.

² *Morgan v. Perhamus*, 36 Ohio St. 517; 38 Am. Rep. 607.

³ *Miller v. Brown*, 47 Mo. 504; 4 Am. Rep. 345.

⁴ *Hubbard v. Bugbee*, 55 Vt. 506; 45 Am. Rep. 637.

⁵ *Gosman v. Cruger*, 69 N. Y. 87; 25 Am. Rep. 141.

⁶ *Russel v. People's Savings Bank*, 39 Mich. 671; 33 Am. Rep. 444.

⁷ *Dailey v. Singer Manuf'g Co.*, 88 Mo. 301.

⁸ *Habenicht v. Rawls*, 24 S. C. 461; 58 Am. Rep. 268.

may not be a surety or guarantor for her husband, nor may she execute any undertaking in his behalf.¹ The Indiana statute positively declares that a married woman's contract of suretyship shall be void. One who, therefore, sells land to a husband, the wife signing as surety the purchase-money notes, and mortgaging her land to secure the notes, cannot enforce notes or mortgage against her or her property.² A married woman does not render her personal property liable for her husband's debts merely by allowing him to have a general use and control over it, consistent with their common interests; although if she permits her husband to deal with and sell it as his own, a purchaser from him would be protected.³ The provision of the Oregon constitution that a married woman's property shall not be subject to her husband's debts or contracts does not prevent her mortgaging it to secure his debt.⁴

ILLUSTRATIONS. — A wife executed a mortgage on her separate property to secure her husband's note before the note was due, without any agreement to extend the time of its payment, or other consideration. *Held*, not enforceable: *Kansas Man. Co. v. Gandy*, 11 Neb. 448; 38 Am. Rep. 370. A married woman executed a promissory note in the ordinary form, without any clause charging its payment upon her separate estate, but authorized the payee to add anything to it which his counsel, upon consideration, should pronounce needful to make it "right, legal, and proper." *Held*, that this warranted the subsequent addition by the payee of the words necessary to charge the payment on her separate estate, and it was immaterial that she was not advised of the precise terms of the addition: *Taddiken v. Cantrell*, 69 N. Y. 597; 25 Am. Rep. 253. A married woman, having a separate estate, borrowed money and gave her notes therefor, avowing that she wanted the money to pay interest on mortgages on her separate estate, but not charging her estate in the notes themselves; in fact, the money was not used for the benefit of her separate estate. *Held*, that her estate was still liable therefor: *McVey v. Cantrell*, 70 N. Y. 295; 26 Am. Rep. 605. A married woman gave a promissory note in payment of her husband's debts, without in terms making it a

¹ *Luther v. Cote*, 61 N. H. 129.

² *Jones v. Ewing*, 107 Ind. 313.

³ *Dean v. Bailey*, 50 Ill. 481.

⁴ *Barrell v. Tilton*, 119 U. S. 637.

charge upon her separate estate. *Held*, that an action could be maintained against her on said note, and her separate estate applied in payment of the same: *Deering v. Boyle*, 8 Kan. 525; 12 Am. Rep. 480. A note given by the wife for a debt of her husband, with a stipulation that it is taken by the payee "on the credit" of her separate estate, *held*, to bind her separate estate: *Orange Bank v. Traver*, 7 Saw. 210. The wife of a charterer of a steamboat, without charging her separate estate, guaranteed the faithful performance of the charter. *Held*, that on breach of the charter she was not liable on her guaranty: *Post v. Koch*, 30 Fed. Rep. 208. A husband made a policy of insurance on his life, payable to his wife on his death. *Held*, that she could not transfer it to her husband's creditor to secure his debt, any more than she could other property of her own: *Smith v. Head*, 75 Ga. 755.

§ 750. **Separate Earnings of Wife.**—The recent married woman's statutes allow married women the benefit of their own labor and services when performed on their own account, free from control or interference of the husband.¹ Land bought by a married woman from her own earnings cannot be taken for her husband's debts.² In Oregon a husband has no right to compel his wife to turn over to him any property acquired by the proceeds of her personal labor.³ The fact that a husband with his sons by their labor raised crops upon a farm belonging to his wife, is not conclusive of the liability of said crops to an execution against him.⁴ Although the statute authorizes a married woman to appropriate her earnings to her separate use, yet, in the absence of evidence of an intention so to appropriate them, the husband is entitled to them;⁵ and if she expends money and furnishes mules in the cultivation of crops on land leased by her husband, and mainly worked by himself and his two minor sons, the crops belong to him, and are subject to his debts.⁶

¹ Schouler on Husband and Wife, referring to and citing statutes of New York, Massachusetts, Rhode Island, Maryland, Kansas, and California.

² *Stewart v. Potts*, 9 Ill. App. 86.

³ *Atteberry v. Atteberry*, 8 Or. 224.

⁴ *Langford v. Greirson*, 5 Ill. App. 362.

⁵ *Birkbeck v. Ackroyd*, 74 N. Y. 356; 30 Am. Rep. 304.

⁶ *Hamilton v. Booth*, 55 Miss. 60; 30 Am. Rep. 500.

Under the New York act of 1860, authorizing a married woman "to perform any labor or services on her sole and separate account," the husband may still maintain an action in his own name for the wife's earnings, if they live together and are mutually engaged in providing for the support of their family, and there is nothing to show an intention on the part of the wife to separate her earnings from those of her husband.¹ A husband living with his wife is presumed to be the head of the family; and the facts that she makes the contracts for board and receives the pay therefor, in the business of keeping a hotel or boarding-house, will not prove the receipts to be her separate property.² A wife may cultivate land owned by her as her separate estate by means of the labor of her husband and their minor children without divesting herself of the legal title to the products, so as to subject them to levy under an execution against the husband.³ A wife's earnings, in connection with her husband's property, by keeping boarders, selling butter, milk, etc., are his, not hers, and property bought with them may be reached by his creditors.⁴

ILLUSTRATIONS. — A hired land and cultivated it with the assistance of his wife, who in 1869 received from her father two cows. In 1878 the cows with their increase had amounted to fourteen head of cattle. *Held*, that a judgment creditor of the husband's could not levy execution upon any of the wife's livestock: *Russell v. Long*, 52 Iowa, 250. In an action to recover of executors for ten years' services as housekeeper for the testator, plaintiff's father, it appeared that she had separated from her husband and supported herself by her earnings. *Held*, that she was entitled to bring the suit, the wages belonging to her: *Pursell v. Fry*, 19 Hun, 595. The statute of Rhode Island provides that property acquired by a woman after marriage "by her own industry shall be absolutely secured to her sole and separate use." *Held*, to enable a woman to recover for board furnished by her after her separation from her husband and before her divorce: *Berry v. Teel*, 12 R. I. 267.

¹ *Birkbeck v. Ackroyd*, 74 N. Y. 356; 39 Am. Rep. 304.

² *Flynn v. Gardner*, 3 Ill. App. 253.

³ *Feller v. Alden*, 23 Wis. 301; 99 Am. Dec. 173.

⁴ *Hamill v. Henry*, 69 Iowa, 752.

§ 751. **Wife as a Separate Trader.** — Equity permits the husband, by a contract before or after marriage with the wife, to confer on her the right to trade for her exclusive benefit.¹ A husband may lawfully, by deed, constitute his wife a sole trader; but if made a sole trader while the husband's affairs are embarrassed, and if she pursues no separate business, but purchases valuable property, she is bound to show from what funds she made the purchases, or they will be declared fraudulent, and subjected to the satisfaction of her husband's creditors.² An oral ante-nuptial agreement that the husband shall not interfere with the business carried on by the wife, and shall not receive any of the profits accruing from it, unless reduced to writing, is void under the statute of frauds, so far as it was made in consideration of the intended marriage, and will not support a post-nuptial settlement founded on it.³ The rights of a husband's creditor will not extend over household goods and furniture which have been purchased with the wife's consent in their own name, by the trustees of money settled to her separate use, and placed by them in a tavern conducted by her husband, to be there used alike by the family and by the guests.⁴ The recent married woman's acts in some states have enlarged the wife's power to trade on her own account, and secured to her the profits of her business to her separate use.⁵ Under these statutes, the husband is not liable on the wife's contracts or for her debts, in the carrying on of her business, unless he participates in it.⁶

¹ Schouler on Husband and Wife, 302; citing *Richardson v. Merrill*, 32 Vt. 27; *Tillman v. Shackleton*, 15 Mich. 447; 93 Am. Dec. 198; *Wieman v. Anderson*, 42 Pa. St. 311; *Duress v. Horneffer*, 15 Wis. 195; *James v. Taylor*, 43 Barb. 530; *Wilthaus v. Ludecus*, 5 Rich. 326; *Uhrig v. Horstman*, 8 Bush, 172; *Cowan v. Mann*, 3 Lea, 229; *Penn v. Whitehead*, 17 Gratt. 503; 94 Am. Dec. 478; but see *McKinnon v. McDonald*, 4 Jones Eq. 1; 72 Am. Dec. 574.

² *Miller v. Tollison*, 1 Harp. Eq. 145; 14 Am. Dec. 711.

³ *Carter v. Smith*, 82 Ala. 334; 60 Am. Rep. 738.

⁴ *Yardley v. Raub*, 5 Whart. 117; 34 Am. Dec. 535.

⁵ Schouler on Husband and Wife, 309.

⁶ Schouler on Husband and Wife, 313; *Parker v. Simonds*, 1 Allen, 258; *Colby v. Lamson*, 39 Me. 119; *Trieber v. Stover*, 30 Ark. 727; *Tuttle v. Hoag*, 46 Mo. 38; 2 Am. Rep. 481.

The wife's contracts regarding her separate trade or business are binding on her separate property, and the husband is not answerable for her solvency. With reference thereto she may make contracts, and sue and be sued, as if sole, except that where she is sued the remedy is to be enforced against her separate property only, and not against her person. She may make contracts of sale, and sue for goods sold and delivered to her customers.¹ The power to do business implies, too, the power to purchase goods, fixtures, and stock for it, and execute the needful instruments of purchase; and hence the wife's contracts for such purchase on credit, her notes, bills, security, or simple indebtedness therefor, must be deemed obligatory, and enforceable by suit or otherwise.² And what she thus purchases in the exercise of her trading discretion is treated as her sole and separate property as against her husband and his creditors.³ A wife cannot form a valid partnership with her husband under a power to carry on business on her sole and separate account.⁴ A married woman living with her husband may not form a mercantile partnership, so as to subject her separate estate at law to its obligations.⁵ But under the New York statute, a husband may enter into a valid partnership agreement with his wife; and the use of the term "Co." to represent her does not contravene the requirement of law that the same represents an actual partner.⁶ In Missouri, a married woman, under her power

¹ *Porter v. Gamba*, 43 Cal. 105; *Trieber v. Stover*, 30 Ark. 727; *Netterville v. Barber*, 52 Miss. 168.

² *Nispele v. Laparle*, 74 Ill. 306; *Krouskop v. Shontz*, 51 Wis. 204; *Dayton v. Walsh*, 47 Wis. 113; 32 Am. Rep. 757; *Wheaton v. Phillips*, 12 N. J. Eq. 221; *Guttmann v. Scannell*, 7 Cal. 455; *Camden v. Mullen*, 29 Cal. 564; *Reading v. Mullen*, 31 Cal. 104; *McCormick v. Holbrook*, 22 Iowa, 487; 92 Am. Dec. 401.

³ *Tallman v. Jones*, 13 Kan. 438; *Meyers v. Rahte*, 46 Wis. 655; *Sammis v. McLaughlin*, 35 N. Y. 647;

Silvens v. Porter, 74 Pa. St. 448; *Dayton v. Walsh*, 47 Wis. 113; 32 Am. Rep. 757.

⁴ *Haas v. Shaw*, 91 Ind. 384; 46 Am. Rep. 607. Prior to the Ohio legislation of 1884 (81 Ohio Laws, 65, 209), a married woman did not possess legal capacity to enter into a copartnership with her husband: *Payne v. Thompson*, 44 Ohio St. 192.

⁵ *Carey v. Burruss*, 20 W. Va. 571; 43 Am. Rep. 790.

⁶ *Zimmermann v. Erhard*, 58 How. Pr. 11.

to contract and to deal with her separate property, may engage with her husband in the publication of a newspaper.¹ A married woman's separate property cannot be invested in a partnership so as to entitle her to a share of the profits as her separate estate.² A married woman carrying on business for herself is liable on notes given by her husband as her agent therein;³ her interest in a business carried on on her separate account is not subjected to payment of her husband's debts by the mere fact that she employs him as salesman in her store, if in good faith;⁴ she may permit her husband to buy, sell, and invest for her, without her property becoming liable for his debts.⁵ In New Jersey, the separate property of a woman may, with her consent, be managed by her husband without necessarily subjecting it to the claims of his creditors, or the proceeds which by reason of his management arise therefrom.⁶ The fact that the husband, by reason of financial embarrassments, is unable to carry on business and support the family in his own name, is no impediment to the wife's engaging in business for that purpose, making him her agent, and purchasing property on credit, so far as may be without hindering his creditors from collecting their debts.⁷ Under the statutes allowing married women to carry on business on their separate account and employ their husbands as agents in such business, a wife becomes liable by so doing for the acts of her husband as her agent, the same as though the marital relation did not exist. Thus the wife is chargeable with knowledge of the fraudulent designs of her husband, by whom she has been induced to execute an assignment of her property fraudulent as to creditors, although in fact no knowledge was obtained or inquiry

¹ *Dunifer v. Jecko*, 87 Mo. 282.

² *Miller v. Marx*, 65 Tex. 131.

³ *Freiberg v. Branigan*, 18 Hun, 344.

⁴ *Ploss v. Thomas*, 6 Mo. App. 157.

⁵ *Troxell v. Stockberger*, 105 Pa. St. 405.

⁶ *Aldridge v. Muirhead*, 101 U. S. 397.

⁷ *Rankin v. West*, 25 Mich. 195.

made by her as to such design.¹ As between a widow and the devisees and distributees of her deceased husband, when the rights of creditors do not intervene, the widow is entitled to money which she earned in a separate business during the coverture, with the understanding and agreement between her and her husband that it was to be hers, although he fraudulently reduced it to his own possession.² Title to property will vest in the wife, though purchased by her with money advanced by her husband, if for use in a business which he permits her to hold out to the world as being transacted on her separate account. By allowing her to deal with such money and property as her own, he estops himself to afterwards deny her authority and ownership as against parties who have relied thereon in dealing with her.³

Where a wife authorizes her husband to contract concerning the benefit of her separate estate, and in so doing to use the name of a firm ostensibly composed of her husband and herself, she is liable upon an obligation executed by him in that form for that purpose.⁴ Where a husband carries on business with money of his wife as her agent, she giving no personal attention to the conduct thereof, and by his skill and personal services makes large profits, part of which he applies to the support of the family, and the surplus of which he invests in property purchased in her name, she cannot, in a suit by his creditors to subject the property so purchased to the payment of his debts, claim the whole of the property as profits arising from her separate money.⁵ For a husband to work gratuitously for his wife in her separate business, honestly conducted in her own name, is not fraudulent as to his creditors.⁶ An averment, in an action against a married woman on

¹ Warner v. Warren, 46 N. Y. 228.

⁴ Noel v. Kinney, 106 N. Y. 74; 60

² Jones v. Reid, 12 W. Va. 350; 29 Am. Rep. 455.

Am. Rep. 423.

³ Sammis v. McLaughlin, 35 N. Y. 647; 91 Am. Dec. 83.

⁵ Glidden v. Taylor, 16 Ohio St. 509; 91 Am. Dec. 98.

⁶ King v. Voos, 14 Or. 91.

her note, that the consideration was personal property purchased by her for use in her separate business, is good without an allegation that the property was delivered to or received by her.¹ A married woman, sued as surety on a note, must show by her answer that the contract did not concern her separate property, trade, or business.² In New York, as against her husband's creditors, the wife may make him managing agent, and let him conduct the business in her name, while she furnishes capital from her own means and takes the profits to herself, paying the managing agent what she thinks best, without subjecting the stock in trade to his debts.³ Crops raised on a wife's land by a husband's labor are not liable for his debts, although she bought the land on credit, and was engaged in paying for it by the profits of the crops so raised.⁴ But where the purchases and sales are made with the husband's knowledge and consent, and he participates in the profits of the business, knowing them to be such, and that she professed to act for him, it may be inferred in general that the purchases were made on the husband's credit.⁵ A woman may acquire by purchase or gift from a third person the note of her husband and enforce it.⁶ A married woman holding stock in a national bank is not exempt on account of her coverture from the liability imposed by the national currency act upon all stockholders in such banks.⁷ Where under the New York married women's acts a married woman carries on a separate business, she is estopped from asserting that negotiable paper issued by her was, in fact, accommodation paper, in like manner as a man would be estopped.⁸ Even if a married woman can enter into a contract so as to be bound as a member of an association for business purposes, yet her husband cannot

¹ *Chandler v. Spencer*, 109 Ind. 553.

² *Gillespie v. Smith*, 20 Neb. 455.

³ *Buckley v. Wells*, 33 N. Y. 518.

⁴ *Dayton v. Walsh*, 47 Wis. 113; 32 Am. Rep. 757.

⁵ *Oxnard v. Swanton*, 39 Me. 125.

⁶ *Franklin Sav. Bank v. Greene*, 14 R. I. 1; 51 Am. Rep. 336.

⁷ *Anderson v. Line*, 14 Fed. Rep. 405.

⁸ *Buffalo Bank v. Guenther*, 13 Abb. N. C. 428.

without authority from her make a binding contract for her by signing her name to the articles of association.¹

ILLUSTRATIONS. — A husband's creditor sold the stock, and the buyer afterwards transferred it to the debtor's wife, she paying the consideration and employing her husband for his board and clothing to carry on the business. *Held*, that the profits belonged to her: *Kutcher v. Williams*, 40 N. J. Eq. 436. A married woman engaged in business on her own account purchased goods on credit, to be used in that business, the husband having no connection with the business, nor in any way participating in the profits therefrom. In an action against the husband for the value of the goods, *held*, that in the absence of proof that the husband had assented to his wife's conducting the business, he was not liable for the debt: *Tuttle v. Hoag*, 46 Mo. 38; 2 Am. Rep. 481. A declaration described the defendant as "doing business as *feme sole*," but did not allege that the contract of lease sued on was made in the course of such business. *Held*, that a judgment for the plaintiff was void: *Magruder v. Buck*, 56 Miss. 314. A married woman living with her husband kept a boarding-house with his consent, and controlled the entire business. *Held*, that a contract of purchase made by her in her own name for the purpose of such business must be regarded as a contract in relation to her sole property, upon which she was personally liable under the Michigan statute relating to married women: *Tillman v. Shackleton*, 15 Mich. 447; 93 Am. Dec. 198.

§ 752. Liability of Separate Estate for Necessaries. — For necessities supplied to the family on the credit of the wife's separate estate equity holds it liable.² A married woman is liable for necessities purchased by her upon credit, and upon her oral promise to pay for them, although they are intended for and are used by her husband and children as well as herself, and although at the time of the purchase she had no separate estate.³ A wife's separate estate is liable in equity for payment of judg-

¹ *Boyd v. Merriell*, 52 Ill. 151.

² *Priest v. Cone*, 51 Vt. 495; 31 Am. Rep. 695; *Roberts v. Kelley*, 51 Vt. 97; *Kronskop v. Shontz*, 51 Wis. 204; 37 Am. Rep. 817; *Wilson v. Herbert*, 41 N. J. L. 454; 32 Am. Rep. 243. Goods of tenant's wife found on demised premises are subject to distress

for rent, although they are her separate property: *Blanche v. Bradford*, 38 Pa. St. 344; 80 Am. Dec. 489. But see *Shaw v. Thompson*, 16 Pick. 196; 26 Am. Dec. 655.

³ *Tienmyer v. Turnquist*, 85 N. Y. 516; 39 Am. Rep. 674.

ments against her husband on notes given by him for materials and merchandise used for her maintenance and support, and for the benefit of her estate where he is insolvent.¹ A note given by a wife whose husband had deserted her, while living apart from him, for necessities used by her in her own support, is void, and her promise to pay it, made after her divorce and before her remarriage, is without consideration and invalid.² The promise of a married woman having a separate estate, to pay for necessities furnished her upon the credit of her estate, is a sufficient consideration for a new promise to pay for them made after the death of her husband.³ Under the statutes, her separate estate is liable for "necessaries" where they are supplied on her credit alone.⁴ In some states the wife is liable jointly with the husband for expenses of the family;⁵ and under some statutes, where they were supplied for her and the family use, and the husband is without means or insolvent.⁶ Under a statute making married women liable on their contracts "for articles necessary for the support of the family," a married woman is liable on her contract for the funeral expenses of her mother, who lived and died in the household leaving no estate.⁷ Under a statute making the wife's property chargeable for the "expenses of the family," it is liable for any debt incurred on account of the family, the subject of the debt to be used in the family.⁸ A house rented for the residence of the husband, wife, and family, suited to their circumstances, is within the meaning of the Kentucky statute, which makes the separate property of

¹ *Smith v. Poythress*, 2 Fla. 92; 48 Am. Dec. 176.

² *Hayward v. Barker*, 52 Vt. 429; 36 Am. Rep. 762.

³ *Sherwin v. Sanders*, 59 Vt. 499; 59 Am. Rep. 750.

⁴ *Schouler on Husband and Wife*, 324; *Cater v. Everligh*, 4 Desaus. 19; 6 Am. Dec. 596; see *Lee v. Campbell*, 61 Ala. 12; *Canly v. Blue*, 62 Ala. 77;

Wright v. Walton, 56 Miss. 1; *McCormick v. Muth*, 49 Iowa, 536.

⁵ *Jones v. Glass*, 48 Iowa, 345; *Jones v. Wilson*, 57 Ala. 122; *Mitchell v. Dillard*, 57 Ala. 317.

⁶ *Schouler on Husband and Wife*, 324.

⁷ *Bair v. Robinson*, 108 Pa. St. 246; 56 Am. Rep. 198.

⁸ *Von Platen v. Krueger*, 11 Ill. App. 627.

the wife liable for "necessaries" furnished the family.¹ A wife cannot be made liable for money borrowed by her husband, on the ground that it was borrowed for the purpose of paying family expenses and was actually so used.² Her separate estate is not liable for professional services rendered in procuring her divorce, unless it be proved that she contracted to pay for the services, or undertook so to charge the estate.³ Under a statute enabling married women to contract in the same manner as if single, a married woman living with her husband can only be made liable for necessities sold to her and on her credit, where she expressly contracts to pay therefor out of her separate estate, or the circumstances show an intention on her part to assume the liability exclusive of the husband.⁴

ILLUSTRATIONS.—A married woman living with her husband gave a written order signed by her, to plaintiff, a grocer, like the following: "Please let bearer have [naming the articles and value], and I will pay you." Defendant had separate property. Goods were procured on the orders for and used in the support of defendant's family. *Held*, that her separate estate was not chargeable for the goods procured: *Baken v. Harder*, 6 Thomp. & C. 440; 4 Hun, 272. A married woman living with her husband and children, for which the husband ordinarily provided, promised to become responsible for provisions to be furnished for the support of the family. She at the time stated that she owned certain separate property, and after the debt was contracted promised to pay it. *Held*, that not having made the debt a charge on, and it not being for the benefit of, her separate estate, such estate was not liable therefor: *Weir v. Groat*, 6 Thomp. & C. 444; 4 Hun, 193.

§ 753. Community Doctrine and Community Property.—There exists in some of the states, borrowed from the civil law, the community idea of the property of husband and wife.⁵ Under this mode, all property purchased

¹ *Bergen v. Foraythe*, 17 B. Mon. 551.

² *Davis v. Ritchey*, 55 Iowa, 719.

³ *Pfirsching v. Falsh*, 87 Ill. 260.

⁴ *Wilson v. Herbert*, 41 N. J. L. 454; 32 Am. Rep. 243.

⁵ See statutes of Texas, California, Louisiana, and Florida.

or acquired during marriage, by or in the name of either husband or wife, or both, including the produce of reciprocal industry and labor, is deemed to belong *prima facie* to the community, and to be liable for the community marriage debts.¹ Upon the dissolution of marriage by death, there having been no testamentary disposition to the contrary of the disposable shares of deceased, this community property goes, after payment of all community debts, as generally regulated, to the survivor, if the deceased leaves no descendant; otherwise, one half to the survivor and one half to the descendants.²

§ 754. Married Woman Liable for Torts.—A married woman is liable, jointly with her husband, for torts committed by her;³ but in England she cannot be made liable on a contract on the ground that it was induced by her fraudulent representations.⁴ In the United States, the courts are not averse to enforcing an equitable estoppel against a married woman who, by her fraud or concealment, has deceived persons with whom she has contracted, or who have proceeded in reliance upon her statements and acts.⁵ A wife is not liable to judgment *in*

¹ Schouler on Husband and Wife, 339; *Cooke v. Bremond*, 27 Tex. 457; 86 Am. Dec. 626; see note to this case in 86 Am. Dec. 628; *Althof v. Conheim*, 88 Cal. 230; 99 Am. Dec. 363. The presumption that property purchased by either husband or wife in Texas is community property may be rebutted: *Hanrick v. Patrick*, 119 U. S. 156.

² Schouler on Husband and Wife, 340.

³ See *ante*.

⁴ "Inasmuch as she is not liable upon her contracts, the common law, in order effectually to prevent her being indirectly made liable under color of a wrong, exempts her from liability even for fraud, where it is directly connected with the contract of the wife, and is the means of effecting it, and parcel of the same transaction": *Liverpool Loan Ass'n v. Fairbairn*, 9 Ex. 429. Thus an action will not lie

against a husband and wife for a fraud of the wife in representing herself to be single, whereby the plaintiff was induced to take her promissory note: *Id.* In an English case (*Wright v. Leonard*, 11 Com. B., N. S., 258), a wife fraudulently represented that a bill of exchange was accepted by her husband, and thereby induced a person to discount it, the court was equally divided in opinion whether an action would lie; the judges on one side holding that the representation was in the nature of a warranty or contract, and therefore not available against a married woman, the other judges holding that it was actionable as a mere fraud.

⁵ See note to *Cravens v. Booth*, 58 Am. Dec. 114-117. A married woman is not estopped from setting up coverture to an action on her judgment bond by the fact that she falsely rep-

personam for the value of property conveyed to her in fraud of her husband's creditors; nor, in event of her death, can such judgment be rendered against her executors. The only remedy available to the creditors, or to the assignee in bankruptcy, is to pursue the property.¹ A married woman is bound and affected by the frauds and omissions of her husband in attending, as her agent, to her property intrusted by her to him.² A wife who avails herself of the results of her husband's fraud, while acting as her agent in reference to her separate estate, is liable as though she were unmarried.³ Although a wife's separate estate is not ordinarily bound by her engagement as surety, yet it is bound if, at the time of contracting, she represents that the engagement is for her own benefit.⁴

ILLUSTRATIONS.—A married woman removed a belt containing a large sum of money from the person of her husband, during his sickness, and returned but a small portion to him on his recovery, though he frequently asked her for the money. *Held*, that an action to recover the residue might be maintained against her estate by the assignee of her husband, who took an assignment of the claim after her death: *Davidson v. Smith*, 20 Iowa, 466. Goods are stolen from a shop and sold by the thief to a wife, in the absence of her husband, and the wife converts them to her personal use as articles of dress. *Held*, that she, as well as the husband, is liable for the goods: *Heckle v. Lurvey*, 101 Mass. 344; 3 Am. Rep. 366. A married woman signed a promissory note with the description of "widow." *Held*, that she was not thereby estopped from asserting and proving her marriage in answer to the claim of the payee: *Canman v. Farmer*, 3 Ex. 698.

§ 755. Marriage Settlements—In General.—A marriage settlement is an agreement made before marriage securing the wife either in the enjoyment of her own property or of a portion of the property of her husband.

resented herself as single at the time she gave it, and thereby obtained the consideration for which it was given: *Keen v. Coleman*, 39 Pa. St. 299; 80 Am. Dec. 524.

¹ *Phipps v. Sedgwick*, 95 U. S. 3.

² *Adams v. Mills*, 38 N. Y. Sup. Ct. 16.

³ *Rush v. Dilks*, 43 Hun, 232.

⁴ *Rogers v. Ins. Co.*, 111 Ind. 343; 60 Am. Rep. 701.

The marriage constitutes a sufficient consideration for such an agreement, and equity is vigilant in sustaining such agreements when *bona fide* and reasonable.¹ Covenants in marriage articles which are not to be performed during the coverture are not extinguished by the marriage.² Formerly, where the trust was executory, equity would interfere only at the instance of one of the parties to the instrument, or their heirs or assigns, and not in favor of remote heirs or strangers. But the rule, as now declared by our highest tribunal, is, that if, from the circumstances under which the marriage articles were entered into by the parties, or as collected from the face of the instrument itself, it appears to have been intended that the collateral relatives, in a given event, should take the estate, and a proper limitation to that effect is contained in them, a court of equity will enforce the trust for their benefit.³ Thus the settlement has been sustained even when in favor of illegitimate children.⁴ The settlement is good even against prior creditors, where it is reasonable, or the wife had no knowledge of the fraud.⁵ If the agreement be made before marriage in writing, the settlement made after marriage is sufficiently supported by the consideration of marriage.⁶ And it has been held that

¹ 2 Kent's Com. 165; *Stilley v. Folger*, 14 Ohio, 610; *English v. Foxall*, 2 Pet. 595; *Hunter v. Bryant*, 2 Wheat. 32; *Tarbell v. Tarbell*, 10 Allen, 278; *Skillman v. Skillman*, 13 N. J. Eq. 403; *Cartledge v. Cutliff*, 29 Ga. 758; *Albert v. Winn*, 5 Md. 66; *Snyder v. Webb*, 3 Cal. 83; *Smith v. Chappell*, 31 Conn. 589; *Croswaigh v. Hutchinson*, 2 Bibb, 407; 5 Am. Dec. 619; *Banks v. Brown*, 2 Hill Ch. 558; 30 Am. Dec. 381; *Sanders v. Miller*, 79 Ky. 517; 42 Am. Rep. 237; *Kesner v. Trigg*, 98 U. S. 50; *McLeod v. Board*, 30 Tex. 238; 94 Am. Dec. 301.

² *Mitchell v. Mitchell*, 4 B. Mon. 380; *Gibson v. Gibson*, 15 Mass. 106; 8 Am. Dec. 94.

³ *Neves v. Scott*, 9 How. 196; 13 How. 268; *Merritt v. Scott*, 6 Ga. 563;

50 Am. Dec. 365; *Michael v. Morey*, 26 Md. 239; 90 Am. Dec. 106.

⁴ *Countts v. Greenhow*, 2 Munf. 363; 5 Am. Dec. 472.

⁵ *Jones's Appeal*, 62 Pa. 324; *Brunnell v. Witherow*, 29 Ind. 123; *Hemig v. Wickham*, 29 Gratt. 628; 26 Am. Rep. 405; *Prewitt v. Wilson*, 103 U. S. 22; *Nat. Ex. Bank v. Watson*, 13 R. I. 91; 43 Am. Rep. 13; *contra, McGowan v. Hitt*, 16 S. C. 602; 42 Am. Rep. 650.

⁶ *Reade v. Livingston*, 3 Johns. Ch. 481; 8 Am. Dec. 520; *Finch v. Finch*, 10 Ohio St. 501; *Izard v. Izard*, 1 Bail. Ch. 228; *Davidson v. Graves*, *Riley Ch. 219*; *Satterthwaite v. Emley*, 3 Green Ch. 489; 43 Am. Dec. 619; *Rogers v. Brightman*, 10 Wis. 55; *Michael v. Morey*, 26 Md. 239; 90 Am.

where the agreement was oral, and the marriage followed, the settlement would be supported.¹ An antenuptial contract, stipulating that in case the husband should die without issue the wife should have everything, is a valid contract.² A woman, before her marriage, may bind herself by an agreement to accept a certain sum in lieu of all claims as her husband's widow.³ A parol antenuptial agreement that on marriage the property which the husband shall receive of the wife shall be given to her and the children of the marriage by will becomes an executed and enforceable agreement upon the execution, after marriage, of the will, and will operate to exclude the husband from making any subsequent disposition, by codicil or otherwise, so as to defeat the agreement.⁴ To debar a husband from taking the portion of his deceased wife's estate to which the law entitles him, an antenuptial agreement shown to have been duly executed must be proved to have been in existence at the time of the wife's death. No presumption arises in favor of its continued existence.⁵ The fact that a person, during an engagement to marry, informs his intended wife that he will settle ten thousand dollars on her constitutes no inducement to the marriage, and is not binding as an antenuptial contract.⁶ An antenuptial contract in which, for five dollars, the woman, having no property, agrees to release her interest in her husband's property, amounting to sixty thousand dollars, will not be enforced in equity, the presumption of designed concealment on the part of the husband not being disproved by evidence.⁷ A foreign antenuptial contract,

Dec. 106. The mutuality of the stipulations in an antenuptial agreement constitutes the consideration. Such an agreement is not against public policy: *Clark v. Clark*, 28 Hun, 509.

¹ *Southerland v. Southerland*, 5 Bush, 591; *Child v. Pearl*, 43 Vt. 224; *Bradley v. Saddler*, 54 Ga. 681; *Gackebach v. Brouse*, 4 Watts & S. 546; 39 Am. Dec. 104; *Satterthwaite v. Em-*

ley, 3 Green Ch. 489; 43 Am. Dec. 619.

² *Johnston v. Spicer*, 107 N. Y. 185.

³ *Paine v. Hollister*, 139 Mass. 144.

⁴ *Lowe v. Bryant*, 30 Ga. 523; 76 Am. Dec. 673.

⁵ *Graves v. Wakefield*, 54 Vt. 313.

⁶ *Chambers v. Sallie*, 29 Ark. 407.

⁷ *Bierer's Appeal*, 92 Pa. St. 265.

valid where made, and by which the husband agreed, for a valuable consideration, that all the property of the intended wife then owned by her, as well as that which they might mutually acquire during marriage, should be absolutely hers, is not inharmonious with the policy of our laws, and will be enforced in this country.¹

In a good many of the states, marriage settlements are required to be acknowledged in a certain form. The property conveyed must be particularly described and scheduled, and recorded within a certain period in the office of the clerk or the register of the county. These requisites must be performed or the settlement cannot be supported, even against subsequent creditors.² But as between the parties, it is good notwithstanding.³ A woman cannot repudiate her antenuptial contract merely because she repents of her bargain, if the provision was a reasonable one in the circumstances, and no fraud or concealment was practiced.⁴

ILLUSTRATIONS.—A marriage settlement by the husband secured to the wife the use of her property to her separate use during her life, then to be disposed of by her as she should see proper; and she died without making any disposition of it. *Held*, that the property vested in her husband on her decease: *Kimball v. Kimball*, 2 Miss. 532; *Hart v. Soward*, 14 B. Mon. 301; *Talbot v. Calvert*, 24 Pa. St. 327; *Mitchell v. Moore*, 16 Gratt. 275. A person, in contemplation of marriage, executed an instrument in writing, reciting the proposed marriage, renouncing all claim and right to the property of his future wife, and declaring her barred of all right in his property, real and personal. *Held*, that the marriage having taken place, all claim by the wife in the property of the husband, except that of dower, was barred, though she was no party to the agreement: *Lyles v. Lyles*, 1 Harp. Eq. 288. By a marriage settlement, personal

¹ *Scheferling v. Huffman*, 4 Ohio St. 241; 62 Am. Dec. 281.

² A man executed a deed to a woman for the expressed consideration of five hundred dollars, the real consideration being her agreement to marry him. Six months afterwards she did marry him. The deed was registered thirteen years after its execution. *Held*, that the deed was not a marriage set-

tlement or a marriage contract, which, under the statute, must be registered within six months to make it valid: *Sullivan v. Powers*, 100 N. C. 24.

³ *Reinhart v. Miller*, 22 Ga. 402; 68 Am. Dec. 506; *Dabney v. Kennedy*, 7 Gratt. 317; *Logan v. Phillips*, 18 Mo. 22; *White v. Palmer*, 1 McMull. 115.

⁴ *Smith's Appeal*, 115 Pa. St. 319.

property was conveyed to trustees for the use of the husband for life, and after his death, to the use of the wife and her heirs, and to no other use. *Held*, that the husband took only a life estate in the property, and, although he survived the wife, was not entitled to more: *Sugg v. Tyson*, 2 Hawks, 472. A contract was made in contemplation of marriage, by which the husband was to secure the wife an annuity after his death of fifteen hundred dollars during her widowhood, or in case of her second marriage, five hundred dollars during her life. When the contract was made, the husband, unknown to the wife, was insolvent. *Held*, that the contract was valid against creditors; and that in the distribution of his estate, her claim was to be estimated at the value of an annuity of five hundred dollars: *In re Jones*, 62 Pa. St. 324. By an antenuptial agreement, a woman agreed to accept a certain sum in place of dower, or of her rights as widow in her husband's estate, real or personal. *Held*, that she was not entitled even to the specific articles allowed to a widow under the statute: *Young v. Hicks*, 92 N. Y. 235. A man, on the eve of marriage, agrees in writing to pay to his intended wife at the rate of a certain sum per week, as long as she shall remain his wife. *Held*, that this contract will be construed as providing for the payment of a sum of money after the termination of the coverture: *Brown v. Slater*, 16 Conn. 192; 41 Am. Dec. 136. By a written contract, a man and woman agreed to intermarry at a future time, and he granted and gave to her certain described bonds, which "he promises to deliver to her on or before the day of their marriage, to be and become her absolute property." *Held*, an antenuptial agreement, which he could not avoid by refusing to marry: *Conner v. Stanley*, 65 Cal. 183. By the terms of a marriage settlement, the intended husband contracted with L., who was a party to the settlement, that the property of the intended wife should be free from his marital rights. *Held*, that L. became *ipso facto* trustee under the settlement, although there were no express words of appointment: *Logan v. Goodall*, 42 Ga. 95. A procured the execution by B, his intended wife, of an agreement by which, in consideration of five hundred dollars to be paid to her if she survived him, she agreed to relinquish all her rights in his property and estate. He represented to her, without reading and without her reading the agreement, that she was to receive five hundred dollars in cash, five hundred dollars if she survived him, and the deed of a house and lot. Nothing whatever was given her under the agreement. In proceedings after his death, *held*, that the agreement was void, and the widow was entitled to her distributive share in his estate: *Pierce v. Pierce*, 71 N. Y. 154; 27 Am. Rep. 22. The trusts of a marriage settlement were substan-

tially as follows: "In trust for the joint use of husband and wife during their joint lives, and in case of the death of either, then to survivor for life; after the death of both, then to the right heirs at law of the wife." The husband survived. *Held*, that he was included in the term "right heirs": *Shaffer v. McDuffie*, 14 Rich. Eq. 46. A husband, in carrying out an antenuptial promise, without consideration transferred a mortgage to his wife, by written assignment, providing that "the interest on said mortgage, and the money thereby secured," were to belong to him during his lifetime. He delivered the mortgage and assignment, and retained the bond. *Held*, after his death, that she could not claim title to the mortgage: *In re Wirt*, 5 Demarest, 179. By an antenuptial contract, the husband was to convey a comfortable homestead to the wife, and to settle on her an amount sufficient to maintain her. This he did not do, and died worth forty-five thousand dollars. *Held*, that three thousand dollars was a proper amount to set aside for the homestead, and that five hundred dollars a year should be allowed for her maintenance: *Collins v. Collins*, 72 Iowa, 104.

§ 756. Frauds on Marital Rights — Secret Conveyance by Wife or Husband before Marriage. — Secret and voluntary conveyances of her property, made by a woman contemplating marriage, may be set aside on the husband's subsequent application as a fraud upon his marital rights.¹ This is so even where her object was to provide for her children by a former marriage.² But if the husband knew of the conveyance before he married her, and chose nevertheless to do so, he has no remedy.³ The assignee of a husband against whose marital rights a fraud has been committed has a right to the protection of a court of equity, the assignment being made for value.⁴ A fraud

¹ 2 Kent's Com. 174, 175, 12th ed.; *Spencer v. Spencer*, 3 Jones Eq. 404; *Tucker v. Andrews*, 13 Me. 124, 128; *Williams v. Carle*, 9 N. J. Eq. 543; *Freeman v. Hartman*, 45 Ill. 57; 92 Am. Dec. 193; *Baker v. Jordan*, 73 N. C. 145; *Hall v. Carmichael*, 8 Baxt. 211; 35 Am. Rep. 696; *Manes v. Durant*, 2 Rich. Eq. 404; 46 Am. Dec. 65; *contra*, *Logan v. Simmons*, 1 Dev. & B. 13.

² *Ramsay v. Joyce*, 1 McMull. Eq. 236; 37 Am. Dec. 550; *contra*, *Green v. Goodall*, 1 Cold. 404.

³ *Cheshire v. Payne*, 16 B. Mon. 618; *Terry v. Hopkins*, 1 Hill Ch. 1; 1 Story's Eq. Jur., sec. 403; *Cole v. O'Neill*, 3 Md. Ch. 174; *O'Neill v. Cole*, 4 Md. 107; *Fletcher v. Asbley*, 6 Gratt. 332; *Charles v. Charles*, 8 Gratt. 486; 56 Am. Dec. 155; *contra*, *Poston v. Gillespie*, 5 Jones Eq. 258; 75 Am. Dec. 437. Or if at the time she was pregnant by the intended husband: *Anonymous*, 34 Ala. 430; 73 Am. Dec. 461.

⁴ *Joyner v. Denny*, 1 Busb. Eq. 176.

upon the wife is not committed by the husband's purchasing lands after marriage, with his separate funds acquired before marriage, and taking the conveyance in the names of his minor children by a previous marriage.¹ So the secret conveyance just before marriage of the husband's property would be a fraud on the wife,²—to the extent, at least, of her dower in the real property conveyed.³

ILLUSTRATIONS. — A wife on the day of her marriage conveyed her real estate without consideration. *Held*, that the transaction was *prima facie* in fraud of her husband's marital rights, and the burden of showing that the facts had been communicated to the husband was upon the grantee: *Robinson v. Buck*, 71 Pa. St. 386. A woman induced a cripple possessed of a few hundred dollars to marry her, by orally promising that the proceeds of her farm should go towards their support so long as they should live. After the marriage he furnished rooms, food, and clothing for the family, and also for the children of his wife by her former marriage, and permitted her to use one hundred dollars of his money to pay a mortgage upon the land. The wife about eighteen months after the marriage delivered to her daughters by her former marriage deeds of the land for the consideration of love and affection only, which she had executed without his knowledge or consent, just on the eve of her marriage. *Held*, that he might maintain an action during the life of his wife to set the deeds aside: *Green v. Green*, 34 Kan. 240; 55 Am. Rep. 256. In February, 1873, plaintiff was a widow living in Indiana, and defendant a widower living in Kansas. In correspondence with her, with a view to marriage, defendant stated that he owned two good farms in Kansas, and some personal property. In April, 1873, defendant, without any pecuniary consideration, conveyed the farms to his two minor children by his first wife, who were living with him, stating that he designed the conveyance as a provision for them in case his proposed marriage should not prove fortunate. In May, 1873, he visited Indiana, and the parties there became

¹ *Smith v. Smith*, 12 Cal. 216; 73 Am. Dec. 533.

² *Schouler on Husband and Wife*, 357; *Thayer v. Thayer*, 14 Vt. 107; 39 Am. Dec. 211; *Kelly v. McGrath*, 70 Ala. 75; 45 Am. Rep. 75. But see *Hamilton v. Smith*, 57 Iowa, 15; 42 Am. Rep. 39.

³ *Petty v. Petty*, 4 B. Mon. 215; 39 Am. Dec. 501; *Smith v. Smith*, 6 N. J. Eq. 515; *Smith v. Smith*, 12

Cal. 217; 73 Am. Dec. 533; *Tate v. Tate*, 1 Dev. & B. Eq. 22; *Littleton v. Littleton*, 1 Dev. & B. 327; *Pomeroy v. Pomeroy*, 54 How. Pr. 228; *Dearmond v. Dearmond*, 10 Ind. 191; *Cranston v. Cranston*, 4 Mich. 230; 66 Am. Dec. 534; *Brown v. Bronson*, 35 Mich. 415; *Youngs v. Carter*, 10 Hun, 194; *Chandler v. Hollingsworth*, 3 Del. Ch. 99.

engaged, and were married in August, 1873. The deed was recorded August 13, 1873, and the plaintiff had no knowledge of it until long afterwards. The defendant provided well for the support of the plaintiff, and no evidence was given of the amount of his property. *Held*, that a refusal to set aside such conveyance as fraudulent was proper: *Butler v. Butler*. 21 Kan. 521; 30 Am. Rep. 441.

§ 757. Conveyances and Gifts of Property to Wife by Husband after Marriage — As against Creditors. — A voluntary conveyance by a husband after his marriage is valid as to subsequent creditors;¹ though it is held that as to them, if fraud is proved, it may be set aside.² The conveyance, however, as to creditors and debts existing at the time may be set aside by them if it is a fraud on them, as where it withdraws from his estate property or money which should go to them in payment of their claims.³ A husband has a right to settle the surplus of property, over and above what he owes, for the benefit of his wife and family.⁴ A husband may give his wife her earnings or anything else, if he is not indebted.⁵ A gift by him to his wife as the avails of her own labor is good as against his creditors, if such proceeds have not actually been reduced into his possession.⁶ A husband who is indebted to his wife may prefer her to other creditors,

¹ *Clark v. Killian*, 103 U. S. 766; *Jones v. Clifton*, 101 U. S. 225; *Davis v. Herrick*, 37 Me. 397; *Story v. Marshall*, 24 Tex. 305; 76 Am. Dec. 106; *Phillips v. Meyers*, 82 Ill. 67; 25 Am. Rep. 295; *Beach v. White*, Walk. Ch. 495; *United States Bank v. Ennis*, Wright, 605; *Spears v. Shropshire*, 11 La. Ann. 559; 66 Am. Dec. 206; *Fox v. Jones*, 1 W. Va. 205; 91 Am. Dec. 383; see *Reade v. Livingston*, 3 Johns. Ch. 481; 8 Am. Dec. 520.

² *Reade v. Livingston*, 3 Johns. Ch. 431; 8 Am. Dec. 520; *Annin v. Annin*, 24 N. J. Eq. 184; *Cramer v. Beford*, 17 N. J. Eq. 367; 90 Am. Dec. 504.

³ *Cases supra*; *Clarke v. McGaihan*, 25 N. J. Eq. 423; *Watson v. Riskamire*, 45 Iowa, 231; *Annin v. Annin*,

24 N. J. Eq. 184; *Davidson v. Lanier*, 51 Ala. 318; *Bowser v. Bowser*, 82 Pa. St. 57; *Nippes's Appeal*, 75 Pa. St. 472; *Cole v. Tyler*, 65 N. Y. 78; *Coleman v. Burr*, 93 N. Y. 17; 45 Am. Rep. 160; *Belford v. Crane*, 16 N. J. Eq. 265; 84 Am. Dec. 155.

⁴ *Gridley v. Watson*, 53 Ill. 186; *White v. Bettis*, 9 Heisk. 645; *Vance v. Smith*, 2 Heisk. 343; *Brookbank v. Kennard*, 41 Ind. 389; *Spring v. Hight*, 22 Me. 408; 39 Am. Dec. 587; *Barnett v. Goings*, 8 Blackf. 284; 44 Am. Dec. 767; *Sims v. Ricketts*, 35 Ind. 181; 9 Am. Rep. 679; *Jones v. Clifton*, 101 U. S. 225.

⁵ *Fisher v. Williams*, 56 Vt. 586.

⁶ *Peterson v. Mulford*, 36 N. J. L. 481.

and can transfer his property to her to apply on the debt, even if it defeats the collection of other debts.¹ A settlement made with a view of incurring future debts would be fraudulent.² But where the post-nuptial conveyance or settlement is for a valuable consideration, it cannot be avoided as fraudulent by creditors.³

ILLUSTRATIONS. — A husband conveyed all his real estate directly to his wife, in consideration of "love and affection," and the deed was duly recorded. He was at the time but slightly in debt, and was possessed of a large amount of personal property. He afterwards contracted debts which his personal property — by reason of losses occasioned by war — was insufficient to pay, and his creditors (one of whom had a small claim which was due when the conveyance was made) filed a bill in equity to subject the land conveyed to the wife to the payment of the debts. *Held*, that the deed was good in equity, and that the land would not be subjected to the debts: *Sayers v. Wall*, 26 Gratt. 354; 21 Am. Rep. 303. An insolvent husband, in consideration of a relinquishment by his wife of her inchoate right of dower in real estate, settled on her certain property. *Held*, that, in the absence of fraud, the settlement would not be disturbed in behalf of the creditors, unless it appeared to be grossly excessive; and that in case the value of the property settled exceeded the value of the dower, the deed of settlement would be vacated only as to the excess: *Burwell v. Lumsden*, 24 Gratt. 443; 18 Am. Rep. 648. A husband leaving home purchased an accident insurance policy for three thousand dollars, and laid it on a table in front of his wife, saying she should take it and take care of it, and if he got killed before he got back, she would be three thousand dollars better off. *Held*, not a gift to her as against creditors: *In re Williams*, 106 Pa. St. 116; 51 Am. Rep. 505. A husband said to his wife that she might have certain earnings of hers to do with as she pleased, but still used them in his business, and gave her no receipt therefor, and she asserted no claim therefor for fourteen years. *Held*, that the gift could not then be established in equity as against his creditors: *Evans v. Covington*, 70 Ala. 440.

¹ *Jordan v. White*, 38 Mich. 253.

² *Allen v. Walt*, 9 Heisk. 242.

³ *Magniac v. Thompson*, 7 Pet. 348; *Booker v. Worrill*, 55 Ga. 332; *French v. Motley*, 63 Me. 326; *Lahr's Appeal*, 90 Pa. St. 507; *Goff v. Rogers*, 71 Ind.

459; *Unger v. Price*, 9 Md. 552; *Point-dexter v. Jeffries*, 15 Gratt. 363; *Simmons v. McElwain*, 26 Barb. 420; *Bullard v. Briggs*, 7 Pick. 533; 19 Am. Dec. 292; *Ready v. Bragg*, 1 Head, 511.

§ 758. **Conveyances and Gifts of Property to Wife by Husband after Marriage — As between Them.** — A direct gift or conveyance of property by the husband to the wife, though void at law, is good in equity;¹ and when once made, cannot be revoked without the mutual consent of both.² A conveyance by a husband directly to his wife is valid as between themselves. And she need not sign the deed.³ At common law, a husband may permit his wife to retain her money free from his marital claims, and if he does so, and borrows it of her, agreeing to repay it, he becomes her debtor.⁴ A mortgage of the homestead, given by the husband to the wife to secure moneys lent to him by the wife from her separate estate, is valid, even if not signed by the wife.⁵ Choses in action may pass by delivery from the husband to the wife, as between themselves, without a written assignment.⁶ A husband cannot maintain an action against a savings bank for its refusal to pay to him money which he has deposited in his wife's name. Having the bank-book therefor made in her name and delivered to her, the book is evidence of the contract of the bank with her to account to her.⁷ And equity will enforce a note given by a husband for her separate money lent by her to him,⁸ or received and collected by him.⁹

¹ Schouler on Husband and Wife, 383; Borst v. Spelman, 4 N. Y. 284; Coates v. Gerlach, 44 Pa. St. 43; Jennings v. Davis, 31 Conn. 134; George v. Spencer, 2 Md. Ch. 353; Deming v. Williams, 26 Conn. 226; 68 Am. Dec. 386; Reynolds v. Lansford, 16 Tex. 286; Pennsylvania etc. Co. v. Neel, 54 Pa. St. 9; Hunt v. Johnson, 44 N. Y. 27; 4 Am. Rep. 631; Sims v. Rickets, 35 Ind. 181; 9 Am. Rep. 679; Kitchen v. Bedford, 13 Wall. 413; Campbell v. Galbreath, 12 Bush, 459. A husband may make a valid gift *causa mortis* to his wife: Marshall v. Jaquith, 134 Mass. 138. A husband may convey land to the wife directly, without intervention of trustee, where the statutes give power to a married woman to enjoy, contract,

sell, transfer, mortgage, convey, devise, or bequeath her property in the same manner and with like effect as if she were unmarried: Burdeno v. Amperse, 14 Mich. 91; 90 Am. Dec. 225.

² Schouler on Husband and Wife, 385.

³ Furrow v. Athey, 21 Neb. 671; 59 Am. Rep. 867.

⁴ Clark v. Clark, 86 Mo. 114.

⁵ Wochocka v. Wochocka, 45 Wis. 423.

⁶ Seymour v. Fellows, 44 N. Y. Sup. Ct. 124.

⁷ Sweeney v. Boston Five Cents Sav. Bank, 116 Mass. 384.

⁸ Hall v. Hall, 52 Tex. 294; 36 Am. Rep. 725; May v. May, 9 Neb. 16; 31 Am. Rep. 399.

⁹ McCampbell v. McCampbell, 2 Lea, 661; 31 Am. Rep. 623.

So a direct gift or conveyance, as against the husband's heirs, is good,¹ especially where it is reasonable;² *aliter* it has been held in North Carolina, where the wife is guilty of adultery and the provision is extravagant.³ But in Kentucky, where a husband, hoping by his generosity to secure domestic felicity, executed a deed to his wife, conveying certain real estate, the facts that his wife, in view of her husband's bounty and to secure it, promised in the future to faithfully and affectionately perform her conjugal duties, and afterwards failed to do so, it was held did not authorize the interposition of a court of chancery in his behalf to set aside the conveyance in case of the wife's subsequently obtaining a divorce *a mensa et thoro*.⁴

ILLUSTRATIONS. — A owned a mare, and while standing beside her in his stable, said to his wife that he gave the mare to her, and so informed his hostler. Before this A's wife had never driven the mare, afterwards she always drove her, and assumed all rights of ownership, except that the mare remained in A's stable, and was cared for at his expense. *Held*, a completed gift: *Armitage v. Mace*, 96 N. Y. 538. A husband deposited money in a savings bank in his wife's name, and she drew checks against it. *Held*, that he could not reclaim it, nor the bank deny its liability to her: *People v. State Bank*, 36 Hun, 607. A husband sold his wife nine lambs for value, which were exempt from execution. *Held*, valid as to those lambs and their increase, and that no change of possession was necessary: *Leavitt v. Jones*, 54 Vt. 423; 41 Am. Rep. 849. A gave to his wife a savings bank pass-book, intending that the deposit should become hers. By force he took the pass-book back and drew the money, despite his wife's protest. *Held*, that she could recover the amount of him: *Brown v. Brown*, 40 Hun, 418. A wife deposited money of her husband, consisting mainly of her own earnings, in a savings bank in her own name, without his knowledge. *Held*, not a gift, but to belong to the husband: *McDermott's Appeal*, 106 Pa. St. 358; 51 Am. Rep. 526. A husband deposited money in a savings bank, saying "he wanted it so that either he or his wife could draw the money." Both entered their names on the signature-book, opposite which the

¹ *Horder v. Horder*, 23 Kan. 391; 33 Am. Rep. 167.

² *Wood v. Braodley*, 76 Mo. 23; 43 Am. Rep. 754; *Majors v. Everton*, 89 Ill. 56; 31 Am. Rep. 65.

³ *Warlick v. White*, 86 N. C. 139; 41 Am. Rep. 453.

⁴ *Orr v. Orr*, 8 Bush, 156.

clerk of the bank wrote the words, "to be drawn by either." A pass-book was given to the husband as a voucher for the deposit. The wife, the day after her husband's death, drew the money, and the administrator brought an action for the amount against her. *Held*, that this transaction did not constitute a valid gift to the wife, there being no delivery of the money or of the evidence of the deposit to her: *Brown v. Brown*, 23 Barb. 565. A husband deposited money in a savings bank in the joint names of himself and wife. There was no proof of a delivery, and no evidence of a gift beyond the fact that he once said that he would have no more to do with it. *Held*, that the deposit was not hers: *Schick v. Grote*, 42 N. J. Eq. 352.

§ 759. Gifts or Conveyances from Wife to Husband.—

A gift or conveyance from the wife to the husband is likewise valid, but is usually regarded by the courts with some suspicion, and to be supported, must be free from fraud or undue influence.¹ False representations made to a wife by a husband, or undue influence exerted by him to induce her to execute a mortgage on her separate property to secure his debt, she having afterwards duly acknowledged it, will not affect the mortgagee or prejudice his security, if the husband's conduct was without the instigation, procurement, knowledge, or consent of the mortgagee.² Where a husband procures control and practical ownership of liens upon his wife's undivided interest in land, of which he is a joint owner, and causes her interest to be sold out at sheriff's sale, and buys it in himself, he is practically vendor and vendee. The husband and wife, being owners of the same property, and also on account of the marital relation, occupy towards each other a fiduciary relation of the most confidential character, which requires the utmost degree of good faith between them; and no court of law or equity will permit

¹ *Cruger v. Douglas*, 4 Edw. Ch. 433; *Boyd v. De la Montagnie*, 73 N. Y. 498; 29 Am. Rep. 197; *In re Jones*, 6 Bism. 68; *Converse v. Converse*, 9 Rich. Eq. 535; *Stiles v. Stiles*, 14 Mich. 72; *Hollis v. Francois*, 5 Tex. 195; 51 Am. Dec. 760; *Wales v. Newbould*, 9 Mich. 45; *Meriam v.*

Harsen, 4 Edw. Ch. 70; *Campbell's Appeal*, 80 Pa. St. 298; *Smyley v. Reese*, 53 Ala. 89; 25 Am. Rep. 598; *Scarborough v. Watkins*, 9 B. Mon. 540; 50 Am. Dec. 529; *Darlington's Appeal*, 87 Pa. St. 510.

² *Green v. Scranage*, 19 Iowa, 461; 87 Am. Dec. 447.

a gross abuse of that relation by any such transaction.¹ Thus a provision more beneficial to a husband than is reasonable may be set up as an abuse of his confidential relation to his wife.² Equity will set aside a wife's gratuitous transfer of property to her husband, induced by his false representations that she was liable for a debt, and that the effect would be to delay the creditors, or in some way save the property; and this, without showing any fraudulent intent on his part in making such representations; a mutual misapprehension or mistake is sufficient.³ A statute forbidding a sale by a wife of her separate property to her husband does not prevent a gift of the same, but such a gift is voidable for constructive fraud.⁴ Money paid to a wife, but received, counted, and kept by her husband, and afterwards invested by him for her, does not constitute a gift from the wife to the husband, but makes him a trustee for her, and he cannot change the character of the transaction into a loan by giving a bond to secure its payment to her.⁵ A gift by a wife to her husband may be inferred from circumstances, as where she has permitted him to manage her property, receive the profits and issues, and expend the surplus for ten years without question. In such case the question of whether there was a gift of such profits and issues is for the jury.⁶

ILLUSTRATIONS.—A note was executed by a husband to his wife for \$3,000, to induce her to relinquish her inchoate right of dower, worth \$390. *Held*, to be valid only for the latter amount: *Kelley v. Case*, 18 Hun, 472. A, who had but little money, married a woman with nearly \$100,000 in real estate. He was a man of strong will, and, shortly after the marriage, she conveyed to him, through a trustee, one undivided half for

¹ *Swishelm's Appeal*, 56 Pa. St. 475; 94 Am. Dec. 107.

² *McRae v. Battle*, 69 N. C. 98; *Witbeck v. Witbeck*, 25 Mich. 439; see also *Birdsong v. Birdsong*, 2 Head, 289; *Wells v. Wells*, 35 Miss. 638; *McClellan v. Kennedy*, 3 Md. Ch. 234.

³ *Boyd v. De la Montagnia*, 73 N. Y. 498; 29 Am. Rep. 197.

⁴ *Cain v. Ligon*, 71 Ga. 692; 51 Am. Rep. 281.

⁵ *Bergey's Appeal*, 60 Pa. St. 408; 100 Am. Dec. 578.

⁶ *McLure v. Lancaster*, 24 S. C. 273; 58 Am. Rep. 259.

his life, remainder to him in case of his surviving her and there being no issue. She subsequently obtained a divorce from him. *Held*, that he should be required to surrender the interest conveyed to him: *Golding v. Golding*, 82 Ky. 51.

§ 760. Power of Married Woman at Common Law to Make Will—Exceptions.—At common law, a married woman could not make a valid will.¹ She might, with the consent of her husband, and provided he survived her, dispose by will of personalty, and he might after her death elect to disaffirm the will.² This rule has been followed in the courts of the United States, except that here his assent cannot be revoked after the will is probated.³ His assent will be presumed from his standing by when the will is made and advising as to it.⁴ The same rule applies to gifts *causa mortis* made by the wife.⁵ Courts of equity have also sustained wills of personalty made by the wife, where the property had been given or settled on the wife for her separate use.⁶ A married woman's right to make a will is further recognized in cases where her husband is dead in law; as where he has been banished or transported for life, or is an alien enemy.⁷

§ 761. Statutory Powers.—In almost all the states a married woman may make a valid will of her separate real and personal property. Some states require the husband's consent; others prevent her from disposing of more than half of her property away from her husband; others prescribe particular forms.⁸

¹ Schouler on Husband and Wife, 457. A husband may by consent give validity to his wife's will of realty when he is her sole heir. *Wagner v. Ellis*, 7 Pa. St. 411; 47 Am. Dec. 515.

² Schouler on Husband and Wife, 458.

³ *Cutter v. Butler*, 25 N. H. 343; 57 Am. Dec. 330; *Fisher v. Kimball*, 17 Vt. 323; *Emery v. Neighbour*, 2 Halst. 142; 11 Am. Dec. 541; *George v. Bussing*, 15 B. Mon. 558; *Wagner v. Ellis*, 7 Pa. St. 413; 47 Am. Dec. 515; *Lee*

v. Bennett, 31 Miss. 119; *Newlin v. Freeman*, 1 Ired. 514.

⁴ *Reed v. Blaisdell*, 16 N. H. 194; 41 Am. Dec. 722.

⁵ *Jones v. Brown*, 34 N. H. 439.

⁶ Schouler on Husband and Wife, 461; *Michael v. Baker*, 12 Md. 158; 71 Am. Dec. 593.

⁷ Schouler on Husband and Wife, 462.

⁸ See more fully on the power of a married woman to make a will the title "Wills," section "Who may make Wills," *post*.

§ 762. **Effect of Marriage on Wills of Husband and Wife.**—The marriage of a man does not revoke his will previously made, but marriage and birth of issue do.¹ The marriage of a *feme sole* revokes her will made before the marriage.² A will of a married woman is revoked by subsequent birth of a child, but only so far, under the statutes of Pennsylvania, as the child would have taken without the will.³ Under a statute that "marriage shall be deemed a revocation of a prior will," such a will is absolutely revoked as to all persons by marriage.⁴

ILLUSTRATIONS.—A widow having children made her will, married again, and died without issue by her second husband. *Held*, that her will was not revoked by implication of law on her second marriage, nor by a statute passed after her marriage, which enacted that marriage should revoke a prior will: *In re Tuller*, 79 Ill. 99; 22 Am. Rep. 164. An affianced wife executed her will before marriage, having obtained the oral consent of her intended husband. *Held*, valid as an antenuptial settlement, although the will was revoked by the marriage by force of statute: *Lant's Appeal*, 95 Pa. St. 279; 40 Am. Rep. 646.

¹ Jarman on Wills, 115.

² *In re Young*, 39 Pa. St. 115; 80

³ Schouler on Husband and Wife, 457; *In re Carey*, 49 Vt. 236; 24 Am.

Am. Dec. 513.

Rep. 133.

⁴ *McAnnulty v. McAnnulty*, 120 Ill. 26; 60 Am. Rep. 552.

CHAPTER XLIV.

DISSOLUTION OF THE MARRIAGE BY DEATH.

- § 763. Right of husband to administer on wife's estate.
- § 764. Duty to bury wife.
- § 765. Right of husband in deceased wife's personalty.
- § 766. In her lands — Tenancy by the curtesy.
- § 767. Right to reimbursement for money spent on her lands.
- § 768. Right of wife to administer on husband's estate.
- § 769. In deceased husband's personalty.
- § 770. Widow's allowance.
- § 771. Widow's paraphernalia.
- § 772. Widow's quarantine.
- § 773. Dower in husband's realty — In general.
- § 774. Of what lands widow dowerable.
- § 775. Dower — How barred or released.
- § 776. Assignment of dower.
- § 777. Statutory dower in the United States.

§ 763. Dissolution of Marriage by Death of Wife — Right of Husband to Administer. — On the death of the wife the husband becomes entitled to administer on her estate, and to him the court must issue letters, unless he decline,¹ or unless, it seems, where at the time of the death they were judicially separated.²

§ 764. Duty of Husband to Bury Wife. — The husband is bound to pay the funeral expenses of his wife,³ even if she have a separate estate.⁴ He is liable for reasonable expenses of his wife's funeral without notice of her death, if he, by his cruelty, compels her to leave him, and makes no provision for her afterwards, and she dies while so

¹ Schouler on Husband and Wife, 405.

² Cooper v. Maddox, 2 Sneed, 135.

³ Smyley v. Reese, 53 Ala. 89; 25 Am. Rep. 598; Sears v. Giddly, 41 Mich. 590; 32 Am. Rep. 168; McCue v. Garvey, 14 Hun, 562; Cunningham v. Reardon, 98 Mass. 538; 96 Am. Dec. 670; even, it has been held, where she is living separate from

him: Ambrose v. Kenison, 4 Eng. L. & Eq. 361; Cunningham v. Reardon, 98 Mass. 538; 96 Am. Dec. 670; and he has the right to the custody of the corpse, and to remove it when he wishes to another sepulture: Durell v. Hayward, 9 Gray, 248; 59 Am. Dec. 284; Weld v. Walker, 130 Mass. 423; Johnston v. Maronus, 18 Abb. N. C. 72.

⁴ Garvey v. McCue, 3 Redf. 313.

apart.¹ If a wife die leaving assets, while her surviving husband is a man without means or credit, in England chancery has, under certain circumstances, bound the estate of the deceased wife with the payment of all claims for medical attendance, funeral expenses, etc., and the same rule has been followed in America.² In Alabama, the husband, as at common law, is bound to pay the wife's funeral expenses, and cannot claim reimbursement therefor out of her estate; nor for a monument which he erects at her grave.³ But in Massachusetts, a husband paying the funeral expenses of his wife, who has left property, may recover them of her executor.⁴ Under a statute providing that the estate of "every deceased person" shall be chargeable with the funeral charges of deceased, a married woman's funeral charges are chargeable to her estate.⁵ A husband who has buried his wife in a public burial-ground is not liable as a trespasser for removing a grave-stone, since placed at her grave by her mother, without injuring the stone, and for the purpose of substituting another.⁶

ILLUSTRATIONS. — A husband and his adult son went together to an undertaker and ordered a coffin and carriages for the funeral of the wife and mother. Nothing was said as to who was to be charged. *Held*, that the husband was liable: *Sears v. Giddly*, 41 Mich. 590; 32 Am. Rep. 168.

§ 765. **Rights of Husband in Deceased Wife's Personality.** — At common law, under the English statutes of distribution, and under those of most of our states, the husband becomes entitled to the whole of the wife's personality at her decease, to the exclusion of her relatives, or even her own children,⁷ subject, of course, to the claims of

¹ *Cunningham v. Reardon*, 98 Mass. 538; 96 Am. Dec. 670.

² *Schouler on Husband and Wife*, 414; *McClellan v. Filson*, 44 Ohio St. 184; 58 Am. Rep. 814.

³ *Smyley v. Reese*, 53 Ala. 89; 25 Am. Rep. 598.

⁴ *Constantinides v. Walsh*, 146 Mass. 281.

⁵ *Buxton v. Barrett*, 14 R. I. 40.

⁶ *Durell v. Hayward*, 9 Gray, 248; 59 Am. Dec. 284.

⁷ *Ransom v. Nichols*, 22 N. Y. 110; *McCosker v. Golden*, 1 Bradf. 64; 2 Kent's Com. 136; *Donnington v. Mitchell*, 2 N. J. Eq. 243; *Jones v. Brown*, 34 N. H. 439; *Hawley v. Burgess*, 22 Conn. 284; *Stockett v. Bird*, 18 Md.

her creditors.¹ "In some states the husband is entitled by law to a portion only of the balance in his hands as administrator, or is postponed to her next of kin altogether; he is not allowed to succeed to her estate by virtue of his marital right without taking out letters of administration; nor to administer without accounting for his balances to the persons designated by statute, as entitled to distributive shares."²

§ 766. Rights of Husband in Deceased Wife's Lands—Tenancy by the Curtesy.—On the death of his wife, the husband's life interest in her lands is at an end, unless he becomes a tenant by the curtesy. Tenancy by the curtesy is a freehold estate in the husband for the term of his natural life. Four things are essential at common law to entitle a husband to curtesy: 1. A lawful marriage; 2. Seisin of the wife at some time during coverture; 3. Birth alive of issue capable of inheritance; 4. Death of the wife. After the birth of the child the husband's title to curtesy becomes possible, and the curtesy is then initiate. After the death of the wife the title to curtesy becomes complete, and the curtesy is then consummate.³ At common law, the right of action for possession of the wife's lands does not accrue to the wife or her heirs until after the death of the husband and the cessation of his right of curtesy, initiate or consummate.⁴ To maintain a claim for curtesy, there must be shown an existence of

484; *Rice v. Thompson*, 14 B. Mon. 377; *Williams v. Carle*, 10 N. J. Eq. 543; *Walker v. Walker*, 25 Miss. 367; *Clay v. Irvine*, 4 Watts & S. 232; *Barnes v. Underwood*, 47 N. Y. 351; *Pickens v. Hill*, 30 Ind. 289.

¹ *Schouler on Husband and Wife*, 400.

² *Schouler on Husband and Wife*, 409, citing *Cox v. Morrow*, 14 Ark. 603; *Welch v. Welch*, 14 Ala. 76; *Nelson v. Goree*, 34 Ala. 565; *Baldwin v. Carter*, 17 Conn. 201; 42 Am. Dec. 735; *Curry v. Fulkinson*, 14 Ohio, 100; *Gill v. Woods*, 81 Ill. 64; 25 Am. Rep. 264;

Wilson v. Breeding, 50 Iowa, 629; *Woodman v. Woodman*, 54 N. H. 226.

³ *Washburn on Real Property*, 128; *Hall v. Hall*, 32 Ohio St. 184; *Nesbitt v. Trindle*, 64 Ind. 183; *In re Leach*, 21 Hun, 381; *Crumley v. Deake*, 8 Baxt. 361; *Malone v. McLaurin*, 40 Miss. 161; 90 Am. Dec. 321. Seisin, in law, of a reversion by the wife during coverture gives the husband curtesy in the land: *McKee v. Cottle*, 6 Mo. App. 416.

⁴ *Dyer v. Wittler*, 89 Mo. 81; 58 Am. Rep. 85.

independent separate life in the issue after birth, and the burden of proof is on the person claiming as tenant by curtesy.¹ A wife's declarations, made shortly after birth of a child, that it had been born alive, are not competent evidence to establish her husband's title to an estate by the curtesy.² Actual seisin by the wife during coverture is not necessary to entitle the husband to curtesy in Ohio.³ Curtesy attaches to the wife's equitable estate of inheritance,⁴ to her real estate, whether separate estate or not,⁵ but not to a life estate,⁶ nor of lands of which his wife was never seised; and if he sells his interest, and as guardian that of his children also, in lands of his deceased wife, of which he was tenant by the curtesy, and invests the proceeds of the sale in other lands, the title to which he takes to himself as guardian of his children, he will not be entitled to curtesy in the lands so purchased by him.⁷ Tenancy by curtesy may be had in lands of the wife of which she had only a seisin in law, they being wild and uncultivated, and not adversely possessed.⁸ A man cannot be tenant by the curtesy of a remainder or reversion expectant upon an estate of freehold, unless the particular estate be determined during the coverture. Neither can he be tenant by the curtesy of lands which are assigned to a woman for her dower. If a woman on whom lands descend endows her mother, and then marries, has issue, and dies in the lifetime of her mother, her husband will not be entitled to an estate by the curtesy in those lands whereof the mother was endowed, because the daughter's seisin was defeated by the endowment.⁹ A husband has no curtesy in land conveyed to a trustee

¹ Doe v. Killen, 5 Del. 14.

² Gardner v. Klutts, 8 Jones, 375; 80 Am. Dec. 331.

³ Merritt v. Horne, 5 Ohio St. 307; 67 Am. Dec. 298.

⁴ Cushing v. Blake, 30 N. J. Eq. 689; Tremmel v. Kleiboldt, 6 Mo. App. 549; Withers v. Jenkins, 14 S. C. 597.

⁵ Winkler v. Winkler, 18 W. Va.

455; Tremmel v. Kleiboldt, 75 Mo. 255.

⁶ Phillips v. La Forge, 89 Mo. 72.

⁷ Bogy v. Roberts, 48 Ark. 117; 3 Am. St. Rep. 211.

⁸ McCorry v. King, 3 Humph. 267; 39 Am. Dec. 165.

⁹ Reed v. Reed, 3 Head, 491; 75 Am. Dec. 777.

for the wife's separate use by a deed expressly excluding the husband from any control.¹ Where the language of a will clearly shows it to be the intention of the testator that his daughter's husband should not acquire an estate by curtesy in land devised to her, such intention will prevail.²

An estate settled on a *feme covert* for life, with a power of appointment at her death in fee, does not give her such an estate as will entitle the husband to curtesy if she fails to appoint.³ Where a testator devises real estate to his daughters for their sole and separate use, to pass at their death directly to their children, the daughters' husbands are not entitled to curtesy.⁴ Tenancy initiate is both salable and assignable.⁵ A husband may convey his inchoate interest, as tenant by the curtesy, in his wife's lands to trustees, for the benefit of his wife and her children, and his indebtedness to her constitutes a valuable consideration for the conveyance, although he is indebted at the time to others.⁶ Where the husband has conveyed his interest in the wife's lands, and afterwards a divorce is obtained by the wife, the wife does not become entitled to the land thereupon, as against the grantees of the husband, as if the husband had died.⁷ The husband's curtesy is not forfeited by his adultery.⁸ A statute giving a married woman the ownership and control of their real estate does not abolish the right of tenancy by curtesy.⁹ In Delaware, Massachusetts, New Hampshire, North Carolina, Rhode Island, and Vermont, the statutes expressly preserve curtesy as at common law, and it also exists in Connecticut, New Jersey, New York, Missouri, Oregon, Arkansas, and Tennessee. In Alabama, Ohio, Oregon, Michigan, Nebraska, and West Virginia, the birth of

¹ Cochran v. O'Hern, 4 Watts & S. 95; 39 Am. Dec. 61.

² Monroe v. Van Meter, 100 Ill. 347.

³ Graves v. Trueblood, 96 N. C. 495.

⁴ Stovall v. Austin, 16 Lea, 700.

⁵ Briggs v. Titus, 13 R. I. 136.

⁶ Hitz v. Met. Bank, 111 U. S. 722.

⁷ Aiken v. Suttle, 4 Lea, 103.

⁸ Wells v. Thompson, 13 Ala. 793;

48 Am. Dec. 76.

⁹ Neelly v. Lancaster, 47 Ark. 175;

58 Am. Rep. 752.

issue is not necessary. In Kentucky, the right extends only to lands of which the wife died seised. In Illinois and Kansas, the husband is given the same right as the wife,—dower. In Indiana, Iowa, Illinois, Maine, Minnesota, Kansas, California, Colorado, Nevada, Georgia, and Mississippi, curtesy is abolished.¹ The Virginia statute, giving a wife the power to possess, enjoy, and devise her separate estate as if sole, destroys the tenancy by the curtesy initiate; but it seems that if the wife dies without having alienated the lands, the husband's curtesy attaches.²

ILLUSTRATIONS.—By a decree in equity, a deed of a woman's land to her intended husband, executed before marriage, is annulled. *Held*, that the husband's curtesy will not be affected by the conveyance: *Gilmore v. Gilmore*, 7 Or. 374. Land was conveyed to a married woman for her sole and separate use, and to her children. She died leaving children. *Held*, that the husband took no estate of curtesy: *Beecher v. Hicks*, 7 Lea, 207. A conveyed land to his daughter, "to have and to hold the same to the said B, her heirs and assigns forever, to be her sole and separate estate, and to be free from the control and liabilities of any husband she may hereafter have, with full power to dispose of the same, at all times, as she may deem proper." B married and died, leaving had issue born alive, and without disposing of the land. *Held*, that her husband had a life estate as tenant by the curtesy: *Carter v. Dale*, 3 Lea, 710; 31 Am. Rep. 660. Land descended to several coparceners, one of whom afterwards married, had issue, and died. Neither she nor her husband had ever lived upon or exercised any act of ownership over the land, but it remained in the possession of the other coparceners. *Held*, that this was a sufficient seisin in fact to sustain the husband's claim as tenant by the curtesy: *Carr v. Givens*, 9 Bush, 679; 15 Am. Rep. 747. A woman acquired land in 1849 and married in 1852, and a child was born of the marriage. The husband's estate by the curtesy was sold under an execution. *Held*, that the wife could not maintain a suit to set aside this sale as a cloud on her title, the husband's estate not being extinguished except by his death, or divorce: *Lang v. Hitchcock*, 99 Ill. 550. A's wife, as B's heiress, was entitled to certain land. A hired the land of B's

¹ See 1 Stimson's Statute Law, sec. 3301; *Freeman v. Hartman*, 45 Ill. 57; 92 Am. Dec. 193; *Koehler v. Miller*, 21 Ill. App. 557.

² *Breeding v. Davis*, 77 Va. 639; 46 Am. Rep. 740.

widow, and A and his wife lived on it. *Held*, that the wife's seisin would support an estate of curtesy in A, who survived his wife: *Nixon v. Williams*, 95 N. C. 103. A railroad company for several years occupied land in which A had an outstanding estate of curtesy. After A and the railroad company first learned of the existence of A's estate, A brought an action to compel payment to him of his just proportion of the rents and profits. *Held*, that he was entitled to the relief sought: *Muldowney v. R. R. Co.*, 42 Hun, 444.

§ 767. **Husband Expending Money on Wife's Property — Right to Recoupment.** — It has always been held in England that if the husband erects buildings upon his wife's lands, or otherwise makes permanent improvements thereon, expending his own money for such purpose, the presumption is that he intended the expense for his wife's benefit, and he cannot recover for it.¹ The same principle has been followed in this country.² So he cannot claim reimbursement for moneys paid in settling controversies in regard to the title of his wife's real estate.³ Where a wife mortgages her separate estate to raise money for her insolvent husband, not knowing him to be such, and where he fraudulently, and with intent to defraud his creditors, and collusively with the mortgagee, spends large sums of money in building upon and improving his wife's land, the husband's assignee in insolvency cannot recover from her for sums of money so expended within the amount of the mortgage, but can recover for other sums expended, and which increased the value of the land, but only to the extent of such increase.⁴ When the husband voluntarily expends money

¹ *Campion v. Cotton*, 17 Ves. 264. Nor can his creditors reach them: *Robinson v. Huffman*, 15 B. Mon. 80; 61 Am. Dec. 177; *Knott v. Carpenter*, 3 Head, 542; 75 Am. Dec. 779; *Webster v. Hildreth*, 33 Vt. 457; 78 Am. Dec. 633; *Premo v. Hewitt*, 55 Vt. 367; *Moore v. Lampton*, 80 Ind. 301.

² *Burleigh v. Coffin*, 22 N. H. 118; 53 Am. Dec. 236; *White v. Hildreth*,

32 Vt. 265; *Brevard v. Jones*, 50 Ala. 221; *Webster v. Hildreth*, 33 Vt. 457; 78 Am. Dec. 632; *Wilkinson v. Wilkinson*, 1 Head, 310; *Marable v. Jordan*, 5 Humph. 417; 42 Am. Dec. 441. ³ *Campbell v. Wallace*, 12 N. H. 362; 37 Am. Dec. 219; *Burleigh v. Coffin*, 22 N. H. 118; 53 Am. Dec. 236.

⁴ *Lynde v. McGregor*, 13 Allen, 182; 90 Am. Dec. 188.

which is common property in building a house on land which is the wife's separate property, he has no lien on the house or land thereof, nor have his creditors after his decease.¹

§ 768. Death of Husband—Right of Wife to Administer.—On the death of the husband, the wife is usually selected to administer his estate, though it is said that she is not entitled as of right, as the husband is in the case of the wife's death.² But statutes in this country in some states prefer the wife.³

§ 769. Wife's Share of Deceased Husband's Personality.—A husband may dispose of his personal property in good faith by gift or otherwise during coverture, free from all *post-mortem* claims thereon by his widow.⁴ By the English statute of distributions,⁵ the widow, the husband dying intestate, is entitled to one third (after paying debts) of the husband's personal property, and the remaining two thirds go to his children or their representatives. If the husband leave no children, then the widow is entitled to one half, and the other half goes to the husband's next of kin. If there are no next of kin, this half goes to the crown. "In this country," says Mr. Schouler, "the statute of Charles II. is at the basis of our legislation regarding the estates of intestates, though modifications are frequently to be met with. Thus in Vermont, if there be no issue, the widow takes the whole estate, if not exceeding two thousand dollars, and one half of the residue above that sum. In Massachusetts, if there be no issue, the widow takes the residue to the amount of five thousand dollars, and one half of the excess above ten thousand dollars. In New York, there are statute provisions on the general subject of distribution quite full and

¹ Peck v. Brummagim, 31 Cal. 440; 89 Am. Dec. 195.

² Schouler on Husband and Wife, 426.

³ Schouler on Husband and Wife, 426.

⁴ Dickerson's Appeal, 115 Pa. St. 198; 2 Am. St. Rep. 547.

⁵ 22 & 23 Car. II., c. 10.

minute. If no descendant or parent survive the husband, the widow takes two thousand dollars and one half of the surplus. But if there be no next of kin to the intestate as near as nephew or niece, she takes the whole surplus. In Maryland, the widow takes, as under the common law at the time of its colonization, her 'reasonable share,' which is one third or one half, according to circumstances. In Pennsylvania, the law gives the same rights, so far as regards the widow and general kindred, as prevails in England under the statute of distributions. In Ohio, the widow takes the entire personal estate after the debts are paid, if there be no children; and if there are any, she takes one half if the estate amounts only to four hundred dollars; and if it exceeds that sum, she takes one third of the surplus. In Indiana, something like the community system in this respect has been lately adopted. In Georgia, the widow's share in her intestate husband's personal estate is affected by her election to take dower. Where there is no widow or kindred, the state generally claims the balance under the statutory provisions, as in England; but if there be a widow, it is common in this country to give her the whole surplus in default of the husband's kindred; while it is moreover apparent, from the foregoing statute provisions, that American legislation strongly favors the widow as against distant kindred of the intestate."¹ The widow's right to a distributive share of her husband's personal estate is not barred by an antenuptial agreement that she would accept certain provisions therein undertaken to be made for her by him, in place of and as a substitute for dower in his estate, and as a bar and estoppel to any and every other claim by her upon his estate.²

§ 770. **Widow's Allowance.** — By statute in some states there is given to the widow what is known as the

¹ Schouler on Husband and Wife, 427.

² Sullings v. Richmond, 5 Allen, 187; 81 Am. Dec. 742.

widow's allowance; i. e., a sum in the discretion of the probate court for the necessities of the widow and minor children, if there be any.¹

§ 771. **The Widow's Paraphernalia.**—The wife's paraphernalia consists of her wearing apparel, her jewels and ornaments, which she possessed at the time of her marriage, or have been given to her by her husband. At common law, they belonged to her husband, but he could not dispose of them by will, and at his death they became absolutely the property of the widow.² A gold watch worn by the wife is paraphernalia.³ So are mourning rings given to her by third persons since her marriage.⁴

§ 772. **The Widow's Quarantine.**—At common law, the widow was entitled to remain for forty days in her husband's house after his death. This was called the widow's quarantine. This right has been recognized in the United States by statutes which generally permit the widow to remain in the mansion-house until dower is allotted to her rent free.⁵ In construing these statutes, the courts hold that she may, if she wishes, rent the house during this time, and collect and keep the rent.⁶

§ 773. **Dower in Husband's Realty—In General.**—Dower is the provision which the law makes for the widow out of the lands and tenements of her husband. It extends to all estates of inheritance which the husband has held at any time during the marriage in his own right, and which any issue of hers might, if born, possibly inherit. It gives to the widow a life interest to the extent of one third of this property. Dower interest accruing to a widow in

¹ Schouler on Husband and Wife, 430.

² Rawson v. R. R. Co., 48 N. Y. 212; 8 Am. Rep. 543; State v. Hays, 21 Ind. 283; Hawkins v. R. R. Co., 119 Mass. 596; McCormack v. R. R. Co., 49 N. Y. 303; Noble v. Milliken, 74 Me. 225; 43 Am. Rep. 581.

³ Howard v. Menifee, 5 Ark. 668.

⁴ In re Grant, 2 Story, 312.

⁵ See Doe v. Barnard, 7 Smedes & M. 319; Inge v. Murphy, 14 Ala. 289; Whaley v. Whaley, 50 Miss. 577; Calhoun v. Calhoun, 58 Ga. 247; Young v. Estes, 59 Me. 441.

⁶ Craige v. Morris, 25 N. J. Eq. 467; Carnall v. Wilson, 21 Ark. 62; 76 Am. Dec. 351.

the real estate of her deceased husband by virtue of the marriage is assignable in equity, and may be enforced in the name of the assignee.¹ Where two widows are entitled to dower in the same lands, as when lands have descended to a son and other heirs subject to their mother's right to dower, and the son thereafter dies leaving a wife entitled to dower in his share, the mother must be considered as endowed of one third of the son's share, and therefore the latter's wife is entitled, as dower, to only one third of two thirds of the son's share.² A married woman may, during the lifetime of her husband, maintain an action in equity for the protection of her inchoate right of dower from the fraudulent acts of her husband.³ A wife's inchoate rights in her husband's estates of inheritance will support an action by her for damages in being defrauded by false representations as to land conveyed to her in consideration of her joining in her husband's deed.⁴ A widow cannot maintain an action before her interest in her deceased husband's realty has been set apart to compel a railway company to purchase her alleged dower interest in a right of way granted by him.⁵ A widow with separate estate equal to her share of her husband's estate has no dower under the law of Mississippi.⁶ A widow's right to dower is covered by the law in force at the time of the husband's death, and not that which was in force at the time of or during the continuance of the marriage.⁷

ILLUSTRATIONS. — H., by falsely representing without his wife's knowledge or consent, that he was unmarried, obtained a loan on a mortgage, and therewith paid off a prior mortgage, taxes, etc. *Held*, that her inchoate right of dower was superior to the mortgagee's equity: *Westfall v. Hintze*, 7 Abb. N. C. 236.

¹ *Strong v. Clem*, 12 Ind. 37; 74 Am. Dec. 200.

² *In re Cregier*, 1 Barb. Ch. 598; 45 Am. Dec. 416.

³ *Buzick v. Buzick*, 44 Iowa, 259; 24 Am. Rep. 740.

⁴ *Bissell v. Taylor*, 41 Mich. 702.

⁵ *Tuttle v. R. R. Co.*, 49 Iowa, 134.

⁶ *Magee v. Young*, 40 Miss. 164; 90 Am. Dec. 322.

⁷ *Ware v. Owens*, 42 Ala. 212; 94 Am. Dec. 642.

§ 774. **Of What Lands Wife Dowable.**—The wife is dowable out of all lands of the husband of purchase or of inheritance,¹ and the improvements thereon.² Seisin in deed is not required, seisin in law being sufficient.³ She is dowable of land of which the husband was the equitable owner;⁴ of land of which he is a tenant in common, but not in that of a joint tenant;⁵ of an equity in redemption;⁶ of mineral lands and mines;⁷ of a tenancy in fee, the fee being determined by the death of the tenant in fee (her husband) without issue;⁸ the surplus of the purchase-money of land sold under a bond for a deed;⁹ lands of which her husband died seised, which have been sold under a judgment against her as his administratrix, though she has not administered all the personalty of his estate, and the purchasers have made improvements on the lands with her knowledge;¹⁰ or in lands which she joined with her husband in conveying, if such conveyance is subsequently set aside as fraudulent and void as to his creditors.¹¹ Where a husband's land is sold on execution, and purchased by a third person with the husband's money, the wife may have dower in the land.¹² If a wife joins her husband in mortgaging his land, and the land is sold on an execution antedating the mortgage, the wife is

¹ Schouler on Husband and Wife, 447.

² Bishop v. Boyle, 9 Ind. 169; 68 Am. Dec. 615.

³ Pledger v. Ellerbe, 6 Rich. 266; 60 Am. Dec. 123.

⁴ McReynolds v. Anderson, 69 Iowa, 208.

⁵ Ross v. Wilson, 58 Ga. 249; Bab-bitt v. Day, 41 N. J. Eq. 392; Harris v. Coats, 75 Ga. 415. In states where the principle of survivorship among joint tenants is abolished, a wife may be endowed. Weir v. Tate, 4 Ired. Eq. 264; Reed v. Kennedy, 2 Strob. 67; 1 Washb. 157, 158; Lee v. Lindell, 22 Mo. 202; 64 Am. Dec. 262.

⁶ Schouler on Husband and Wife, 449; Bank v. Owens, 31 Md. 320; 1 Am. Rep. 60; Cox v. Garst, 105 Ill. 342. In some states the common-law

rule is followed, and a wife is not dowable of an equity of redemption or other equitable estates. In others, like Maryland, New York, Kentucky, North Carolina, Iowa, and Tennessee, the statute makes the wife dowable if the husband held the equitable estate at his death: 1 Washb. 163, 4th ed., and cases cited; Glenn v. Clark, 53 Md. 580; Abbott v. Bosworth, 36 Ohio St. 605.

⁷ Billings v. Taylor, 10 Pick. 460; 20 Am. Dec. 533; Lenfers v. Henke, 73 Ill. 405; 24 Am. Rep. 263; Hendrix v. McBeth, 61 Ind. 473; 28 Am. Rep. 680.

⁸ Lovett v. Lovett, 10 Phila. 537.

⁹ Hollis v. Hollis, 4 Baxt. 525.

¹⁰ Phinney v. Johnson, 13 S. C. 25.

¹¹ Munger v. Perkins, 62 Wis. 499.

¹² Efland v. Efland, 96 N. C. 488.

restored to her original position, and may recover dower in the land after her husband's death.¹ She is not dowerable out of estates not of inheritance;² nor of wild lands;³ nor of a life estate, or an estate for a term of years;⁴ nor of a reversion or remainder expectant upon an estate of freehold;⁵ nor of an estate *per auter vie*;⁶ nor of an estate held by her husband as trustee;⁷ nor in land sold in good faith by her husband to pay for its purchase, although he sold more than was necessary to pay the amount;⁸ nor in land of which her husband entered into possession under a parol contract to purchase, he having paid no part of the purchase-money; and that he tendered the purchase-money does not alter the case;⁹ nor where the seizin is merely transitory, as where land is conveyed to a man who immediately thereafter mortgages it or reconveys it to trustees to secure the purchase-money;¹⁰ nor where the land was conveyed to the husband subject to a mortgage to its full value;¹¹ nor of partnership lands;¹² nor of land held by the husband under a bond for title;¹³ nor of land which the husband had

¹ Hinchliffe v. Shea, 103 N. Y. 153.

² Schouler on Husband and Wife, 447.

³ Webb v. Townsend, 1 Pick. 21; 11 Am. Dec. 132; White v. Culler, 17 Pick. 248; Johnson v. Perley, 2 N. H. 56; 9 Am. Dec. 35. "Because clearing them by cutting the trees would be deemed waste": Brackett v. Persons Unknown, 53 Me. 238; 87 Am. Dec. 549. *Aliter* as to flats, although covered by tide-waters: Brackett v. Persons Unknown, 53 Me. 238; 87 Am. Dec. 549.

⁴ Burns v. Page, 12 Mo. 358; Goodwin v. Goodwin, 33 Conn. 314; although the lease was for 999 years: Whitmire v. Wright, 22 S. C. 446; 53 Am. Rep. 725.

⁵ Houston v. Smith, 88 N. C. 312.

⁶ 1 Washburn on Real Property, 153.

⁷ Thompson v. Murray, 2 Hill Ch. 204; 29 Am. Dec. 68; McCauley v.

Grimes, 2 Gill & J. 318; 20 Am. Dec. 434.

⁸ Melone v. Armstrong, 79 Ky. 248.

⁹ Latham v. McLain, 64 Ga. 320.

¹⁰ Gilliam v. Moore, 4 Leigh, 30; 24 Am. Dec. 704; McCauley v. Grimes, 2 Gill & J. 318; 20 Am. Dec. 434; Rawlings v. Lowndes, 34 Md. 643; Henisler v. Nicklum, 38 Md. 277; Heyman v. Cochrane, 51 Ill. 302; 2 Am. Rep. 303; Baker v. McCune, 82 Ind. 339. Money borrowed of a third person and invested in land is not "purchase-money": Jensen v. Garden, 29 Ill. 199; 81 Am. Dec. 306.

¹¹ Strong v. Converse, 8 Allen, 557; 85 Am. Dec. 732.

¹² Greene v. Greene, 1 Ohio, 535; 13 Am. Dec. 642; until the firm account has been adjusted: Simpson v. Leech, 86 Ill. 286; Dyer v. Clark, 5 Met. 562; 39 Am. Dec. 697.

¹³ Pugh v. Bell, 2 T. B. Mon. 125; 15 Am. Dec. 142.

before marriage conveyed to a child by a former marriage;¹ nor of improvements made upon the land by a purchaser at a judicial sale;² nor of lands exchanged for others;³ nor of land fraudulently conveyed to her by her husband, although the deed is afterwards set aside;⁴ nor in improvements made on the land after its alienation by the husband.⁵

A widow, whose husband, being entitled to a remainder in fee after a life estate, dies during the life of the tenant for life, is not entitled to dower in the lands or their proceeds after the termination of the life estate.⁶ Lands purchased with partnership funds are subject to a right of dower where the purchase of the lands was not in pursuit of the partnership business, and it is not necessary to have recourse to the land in order to pay the firm debts, and where, moreover, there is no special agreement between the parties that the land shall be considered as personalty.⁷ A woman who innocently marries and cohabits with a man who has a wife living, from whom he has never been legally divorced, cannot acquire an interest in his land by reason of such supposed marriage.⁸ Where there is a devise in fee with an executory devise over, the wife's right of dower attaches on the first estate, and is not defeated by its determination.⁹ A widow's claim for dower is paramount to the claim of the grantee of the husband under a mortgage which was a lien on the land at the time of the marriage, but which such grantee discharged.¹⁰

¹ *Gaines v. Gaines*, 9 B. Mon. 295; 48 Am. Dec. 425.

² *Gove v. Cather*, 23 Ill. 634; 76 Am. Dec. 711.

³ *Stevens v. Smith*, 4 J. J. Marsh. 64; 20 Am. Dec. 205. She is not dowable in both, but may elect of which she will take her dower: *Mahoney v. Young*, 3 Dana, 588; 28 Am. Dec. 114; but see *Cass v. Thompson*, 1 N. H. 65; 8 Am. Dec. 36.

⁴ *Hopkins v. Bryant*, 85 Tenn. 520; *Bond v. Bond*, 16 Lea, 306.

⁵ *Van Doren v. Van Doren*, 3 N. J.

L. 697; 4 Am. Dec. 408; *Catlin v. Ware*, 9 Mass. 218; 6 Am. Dec. 56; *Thompson v. Morrow*, 5 Serg. & R. 239; 9 Am. Dec. 359; *Boyd v. Carlton*, 69 Me. 200; 31 Am. Rep. 268.

⁶ *Warren v. Williams*, 25 Mo. App. 22.

⁷ *Markham v. Merrett*, 7 How. 437; 40 Am. Dec. 76.

⁸ *De France v. Johnson*, 26 Fed. Rep. 891.

⁹ *Pollard v. Slaughter*, 92 N. C. 72; 53 Am. Rep. 402.

¹⁰ *Bartlett v. Muslinex*, 28 Hun, 235.

Her dower in lands held under contract of purchase made by her husband in his lifetime is subordinate to the right of the vendor or his grantee to sell the land for the payment of the balance of the purchase price remaining due. Subject to such payment, she is entitled to her dower; and she may have the land sold to pay the debt and be endowed of one third of the money remaining after such payment.¹

ILLUSTRATIONS.—L.'s wife died seised of certain real estate, L. and three children surviving her. The three children, including N., died intestate and without issue, L. surviving them. *Held*, that N.'s widow was not entitled to dower in the premises, N. not being "seised of an estate of inheritance at any time during the marriage": *In re Leach*, 21 Hun, 381. A husband purchased an equity of redemption in mortgaged lands, and subsequently mortgaged the premises to the prior mortgagee, to whom he afterwards released all his interests. *Held*, that the husband did not have such a seisin as would entitle the wife to dower against the mortgagee and his assigns: *Bird v. Gardner*, 10 Mass. 364; 6 Am. Dec. 137. A husband during coverture conveyed land to a trustee for the sole and separate use of a woman for her life, and at her death "to revert" to the grantor and his heirs, and died pending the life estate. *Held*, that his widow was not entitled to dower in the remainder or reversion: *Vanleer v. Vanleer*, 3 Tenn. Ch. 23. R. bought land of H. and gave a mortgage thereon for the purchase-money, which R.'s wife signed. R. executed a second mortgage to G, which his wife did not sign. Upon foreclosure and sale of the second mortgage, M. purchased the land, and afterwards obtained a transfer of the first mortgage. R.'s wife filed a bill to have dower allotted to her out of the land. *Held*, that she was not entitled to dower until she had redeemed the first mortgage: *McMahon v. Russell*, 17 Fla. 698. A. bought land from G., I. advancing the purchase-money. To secure the money thus advanced, A. executed a deed of trust upon the land, and died. *Held*, that A.'s widow was dowerable in the land: *Spencer v. Lee*, 19 W. Va. 179. A agrees to sell land, and dies, and the contract is rescinded because of a defect in A's title. *Held*, that his widow is entitled to dower in the land: *Lunsford v. Jarrett*, 11 Lea, 192. A, in order to obtain a loan from the state sinking fund, conveyed land to B, who executed a mortgage without his wife joining, obtained the money, and

¹ *Thompson v. Cochran*, 7 Humph. 72; 46 Am. Dec. 68.

on the same day that the mortgage was given, reconveyed to A. *Held*, that B's seisin was instantaneous, and his wife was not entitled to dower: *Johnson v. Plume*, 77 Ind. 166. A wife claimed land under a parol trust. Her husband had paid for the land, and had caused it to be paid to a third party. The court refused to recognize the trust as against the husband's creditors, because of its not being established by written evidence. The wife then amended her bill, claiming dower. *Held*, that she was entitled to dower: *Martin v. Lincoln*, 4 Lea, 289. The owner of a tract of land sold it, with a mill thereon. The mill was subsequently carried away and another built on the same site. A third mill, upon a more extensive plan, was afterwards built. The vendor's widow was held to be entitled to dower in the land only, and not in the mill: *Braxton v. Coleman*, 5 Call, 433; 2 Am. Dec. 592. Land was conveyed to a husband, but afterwards, and before it was recorded, the deed was destroyed by his direction. *Held*, that after his death his widow was entitled to dower in the land so conveyed: *Johnson v. Miller*, 40 Ind. 376; 17 Am. Rep. 699. A father conveyed land to his four sons in fee, who, on the same day, mortgaged the same land to the father to secure the payment of a sum of money and the maintenance of the father during life. *Held*, that there was only an instantaneous seisin in the sons, and therefore the wife of one had no claim to dower in the land: *Holbrook v. Finney*, 4 Mass. 566; 3 Am. Dec. 243. A husband secretly executed a deed to his sons immediately before his marriage; the court concluded from a review of the evidence that the deed was without consideration, and was not delivered until after the grantor's marriage. *Held*, that his widow was entitled to dower in the land, upon two grounds: 1. Because the husband was seised of the land during coverture; 2. Because, had the deed been delivered at its date, its execution was fraudulent as to the widow, being executed secretly for the purpose of cutting off her dower: *Cranson v. Cranson*, 4 Mich. 230; 66 Am. Dec. 534. A deed of land reserved a life estate to the grantor and his wife. *Held*, that on his death in the absence of proof that the reservation to her was intended to be in lieu of dower and homestead, she was entitled to both out of his other land: *McRoberts v. Copeland*, 85 Tenn. 211. The guardian of a male infant, acting within his authority, entered into an executory contract for the sale of the infant's land. The infant afterwards married. *Held*, that his widow was not entitled to dower in the land, her husband not having been beneficially seised of it at the time of the marriage: *Fontaine v. Dunlap*, 82 Ky. 321. A contract of partnership in land provided for the purchase and sale of the land by a trustee, and for conversion of the land into cash before a settlement of partnership

dealings, and not for a division of the land. *Held*, that the wife of one of the partners got no dower right: *Mallory v. Russell*, 71 Iowa, 63; 60 Am. Rep. 776.

§ 775. **Dower, how Barred or Released.**—The most usual way in which a wife bars her dower is by her joinder in the conveyance made by the husband of the property.¹ But it may also be barred by an antenuptial agreement.² An infant *feme covert* joining with her husband in a mortgage to secure the purchase-money of an estate cannot claim dower as against the mortgagor; and the rule is the same if a third person advanced the purchase-money under an agreement that the mortgage should be executed.³ A widow may have her dower of the whole estate mortgaged by herself and husband by repaying her proportion of the amount paid by one claiming under her husband, and who has redeemed; or she may have her dower according to the value of the estate, after deducting the amount paid for the redemption.⁴ She is entitled to dower in mortgaged premises as against every person except the mortgagee and those claiming under him, where she made the mortgage with her husband.⁵ Where a wife releases her claim of dower by joining her husband in a conveyance, and the purchaser recovers back the purchase-money on account of the grantor's defect of title to the land, the release of the wife thereby becomes inoperative, and does not bar her right of dower after

¹ Schouler on Husband and Wife, 452; *Higginbotham v. Cornwell*, 8 Gratt. 83; 56 Am. Dec. 130; *Graves v. Braden*, 62 Ind. 93; *Robinson v. Moon*, 56 Ala. 241; *French v. Lord*, 69 Me. 537; *Lively v. Paschal*, 35 Ga. 218; 89 Am. Dec. 232.

² *Spencer v. Boardman*, 118 Ill. 553; *Barth v. Lines*, 118 Ill. 374; 59 Am. Rep. 374.

³ *Glenn v. Clark*, 53 Md. 580. In Minnesota, a married woman cannot release to her husband her contingent or inchoate interest under the statute in his real estate, so as to exclude her as widow from dower: *Rausch's Estate*,

35 Minn. 291. An oral antenuptial agreement by a woman to renounce all interest in her intended husband's estate after his death is void under the statute of frauds, and is not made valid by the subsequent marriage, nor by her executing after marriage a written agreement to that effect purporting to have been executed before marriage: *McAnnulty v. McAnnulty*, 120 Ill. 26; 60 Am. Rep. 552.

⁴ *McCabe v. Bellows*, 7 Gray, 148; 66 Am. Dec. 467.

⁵ *McCabe v. Bellows*, 7 Gray, 148; 66 Am. Dec. 467.

her husband's decease.¹ A wife can only be divested of her dower by a deed properly and legally acknowledged, and a deed not so acknowledged is wholly inoperative as to her, and is to be treated as if she had not been a party to it.² A release of the wife's inchoate right of dower is a valid consideration for a conveyance of property to her. The elements for computing the worth of such right are so uncertain that the court will not pronounce the transaction fraudulent from the fact that the wife insisted upon and received a sum greater than her dower, if the facts do not show *mala fides* in her or her husband.³ Dower is not barred by the wife's release executed by joining in her husband's deed which is afterwards set aside as fraudulent and void as against creditors.⁴ Dower is not barred where the administrator sells the land of his intestate, and out of the proceeds pays off a mortgage made by the intestate in which the wife joined, relinquishing dower. In such case, the purchaser cannot use the mortgage to defeat the widow's right of dower.⁵ The foreclosure of a mortgage in which the wife did not join, and sale thereunder, does not bar her right of dower in the mortgaged premises, although she is made a party defendant in the foreclosure proceeding, but in which her right of dower is not put in issue. *Aliter*, if the wife had joined in the mortgage, or her right to dower had been put in issue by allegations in the petition.⁶ A sale of land under a charge created before the owner's marriage cuts off his wife's right of dower.⁷ A wife's inchoate right of dower in lands held by her husband as co-tenant is divested by a sale thereof under the Ohio act providing for the partition of real estate, and the entire estate passes to the purchaser at such sale.⁸

¹ *Stinson v. Sumner*, 9 Mass. 143; 6 Am. Dec. 49.

² *Grove v. Todd*, 41 Md. 633; 20 Am. Rep. 76.

³ *Singree v. Welch*, 32 Ohio St. 320.

⁴ *Malloney v. Horan*, 49 N. Y. 111; 10 Am. Rep. 335.

⁵ *Jones v. Bragg*, 33 Mo. 337; 84 Am. Dec. 49.

⁶ *Moomey v. Maas*, 22 Iowa, 380; 92 Am. Dec. 395.

⁷ *Shiell v. Sloan*, 22 S. C. 151.

⁸ *Weaver v. Gregg*, 6 Ohio St. 547; 67 Am. Dec. 355.

The statutes of several states provide that dower may be barred by a conveyance to the wife before marriage of real property by way of jointure, or by a settlement before marriage in lieu of dower. In the case of a settlement after marriage she may elect to take it or her dower as she pleases, but she cannot take both. So of a provision made her by her husband's will.¹ The wife is not required to elect between her right to dower and a legacy under her husband's will, unless the intent that she exercise such choice appear from express provisions in the will, or by a necessary implication from its terms.² To constitute an election by a widow to accept a legacy bequeathed to her in lieu of dower, there must be some decisive act on her part, with knowledge of her situation and rights, or there must be an intentional acquiescence in such acts of others as are not only inconsistent with her claim of dower, but render it impossible for her to assert her claim without prejudice to the rights of innocent persons.³ A wife's dower in lands aliened by the husband is not barred by a devise to her of all her husband's property during her life or widowhood, though the devise is accepted.⁴ A devise, no matter how large, by the testator to his wife does not bar her claim to dower, unless it is expressly stated to be in lieu of dower, or unless her claim to dower would defeat the provisions in the will.⁵ A wife is put upon her election by the charge of an annuity upon land in favor of the widow or "a support and home" for her, where it is made a charge upon land devised by the husband.⁶ Dower may also be barred in other ways; viz., by the wife's elopement and adul-

¹ *Melizet's Appeal*, 17 Pa. St. 449; 55 Am. Dec. 573.

² *Gordon v. Stevens*, 2 Hill Ch. 46; 27 Am. Dec. 445.

³ *English v. English*, 3 N. J. Eq. 504; 29 Am. Dec. 730. Widow is not deprived of dower, or testamentary provision, where the will contains nothing which declares the provision to be in

lieu and bar of dower: *Hall v. Hall*, 8 Rich. 407; 64 Am. Dec. 758.

⁴ *Braxton v. Freeman*, 6 Rich. 35; 57 Am. Dec. 775.

⁵ *Evans v. Webb*, 1 Yeates, 424; 1 Am. Dec. 308.

⁶ *Worthen v. Pearson*, 33 Ga. 385; 81 Am. Dec. 213.

tery,¹ or by her divorce.² Her refusal to receive her dower vests the absolute title in the heir, the same as if the dower was barred by the statute of limitations.³ A wife by separating from her husband does not forfeit her right of dower, where such separation arises from family discord, even though she had no justifiable cause for separating.⁴ While, under the Nebraska statute, a woman who obtains a divorce for her husband's misconduct is entitled to dower in his lands as though he were dead, if the court award her a gross sum by way of alimony, this is in lieu of dower.⁵ Where a statute provides that divorce bars curtesy and dower, it embraces a valid divorce obtained in another state.⁶ Under a statute barring dower, if the wife "voluntarily leave her husband, and go away and continue with an adulterer," dower is not barred, where the husband, under the pretense of joining the confederate army, abandoned the wife, and she, being informed by his relatives that he was dead, married another man.⁷

"By her own acts," says Mr. Schouler,⁸ "sometimes in the nature of an estoppel, though very rarely;⁹ by lapse of time; by a judicial sale; by the defeat of her husband's defeasible title; by her own jointure; and perhaps by an exercise of the right of eminent domain on the part of the government,¹⁰—a wife may be debarred from receiving her dower."¹¹ A wife is estopped from claiming dower in

¹ Schouler on Husband and Wife, 451; *Bell v. Nealy*, 1 Bail. 312; 19 Am. Dec. 686; *Elder v. Reel*, 62 Pa. St. 308; 1 Am. Rep. 414. But not for desertion without adultery: *Wiseman v. Wiseman*, 73 Ind. 112; 38 Am. Rep. 115.

² Schouler on Husband and Wife, 451; *McCraney v. McCraney*, 5 Iowa, 232; 68 Am. Dec. 702; *Marvin v. Martin*, 59 Iowa, 609; *Boyles v. Latham*, 61 Iowa, 174.

³ *Farmer v. Ray*, 42 Ala. 125; 94 Am. Dec. 633.

⁴ *Thayer v. Thayer*, 14 Vt. 107; 39 Am. Dec. 211.

⁵ *Tatro v. Tatro*, 18 Neb. 395; 53 Am. Rep. 820.

⁶ *Hawkins v. Ragsdale*, 80 Ky. 353; 44 Am. Rep. 483.

⁷ *Payne v. Dotson*, 81 Mo. 145; 51 Am. Rep. 225.

⁸ Schouler on Husband and Wife, 451.

⁹ 1 Wash. Real Prop. 197; *Crenshaw v. Creek*, 52 Mo. 98.

¹⁰ *Moore v. Mayor*, 8 N. Y. 110; 59 Am. Dec. 473; *Duncan v. Terre Haute*, 85 Ind. 106; *Guyne v. Cincinnati*, 3 Ohio, 24; 17 Am. Dec. 576; *French v. Lord*, 69 Me. 537; but see *Simar v. Canaday*, 53 N. Y. 304; 13 Am. Rep. 523.

¹¹ 1 Wash. Real Prop. 203-208, 217, 218; *Carson v. Murray*, 3 Paige, 483; 4 Kent's Com. 70; *Tisdale v. Risk*, 7

the land of her husband where the land had been sold by order of court for the benefit of her husband's creditors, and she had caused it to be announced that she would not claim dower against the purchaser.¹ A widow who sells land of her deceased husband, as guardian of his sole heir at law under order of court, unconditionally, without reference to any claim of dower, and as the sole property of the ward, is estopped from setting up a claim of dower against one who purchases at such sale in ignorance of her claim.² Dower is not divested or barred by an assignee's sale of the bankrupt's lands,³ nor by accepting and retaining a gift of personalty from the husband, made by him in contemplation of death.⁴ A sale of land under judgment against the husband does not bar the widow of her right of dower, although the court directs the proceeds of the sale to be first applied in satisfaction of a prior mortgage, in which the wife joined and released her dower.⁵ A sale in partition proceedings among the heirs cannot cut off the widow's right of dower, which is an estate, not a lien; nor her acceptance of service in the partition proceedings.⁶ The wife's inchoate right of dower in lands which were mortgaged at the time her husband became the owner thereof ceases at the sale of the lands, during the lifetime of her husband, under a power in the mortgage, and she is not entitled to share in the surplus.⁷

ILLUSTRATIONS. — A husband conveyed real estate to his wife, and both united in a conveyance to F. A creditor of the husband procured the conveyances to be set aside as fraudulent, and obtained possession himself. *Held*, that on the death of the husband the widow was entitled to dower: *Richardson v. Wyman*,

Bush, 139; *Runnells v. Webber*, 59 Me. 488; *Ervin v. Brady*, 48 Miss. 560; *Sheldon v. Bradley*, 37 Conn. 324; *Geltzer v. Geltzer*, *Bailey Eq.* 387; 23 Am. Dec. 180.

¹ *Connolly v. Branstler*, 3 Bush, 702; 96 Am. Dec. 278.

² *Wiseman v. Macy*, 20 Ind. 239; 83 Am. Dec. 316.

³ *Lazear v. Porter*, 87 Pa. St. 513.

⁴ *Mitchell v. Word*, 60 Ga. 525.

⁵ *Taylor v. Fowler*, 18 Ohio, 567; 51 Am. Dec. 469.

⁶ *Diefenderfer v. Eshleman*, 113 Pa. St. 305.

⁷ *Newhall v. Lynn et al.* Bank, 101 Mass. 428; 3 Am. Rep. 387.

62 Me. 280; 16 Am. Rep. 459. The owner of land contracted to sell it, but died before the sale was completed; an action for specific performance was brought against his widow and heirs, and a decree obtained accordingly. *Held*, that the widow was not estopped to claim dower in the land: *Grady v. McCorkle*, 57 Mo. 172; 17 Am. Rep. 676. A decree of divorce *a mensa et thoro* in the wife's favor directed the payment to her of a sum in gross, the husband to be no further liable. *Held*, that after his death she was entitled to dower in his lands: *Taylor v. Taylor*, 93 N. C. 418; 53 Am. Rep. 460. A man married a woman in good faith, and on ascertaining that a former wife was not dead, obtained a judgment under the New York statute dissolving the second marriage. *Held*, that the second wife was entitled to dower in land owned by her husband while the marriage continued in force: *Price v. Price*, 33 Hun, 76. A man and a woman entered into an antenuptial contract to retain their respective estates, with power to each to manage and dispose of, with the proviso that in case of his death, she surviving, there should, within one year, be paid to her fifteen hundred dollars; and she covenanted that upon his death, she surviving, she would release all interest in his estate except the claim of fifteen hundred dollars. The parties married, and the man died. The woman was never paid the sum of fifteen hundred dollars, and there were no assets of her husband's estate. *Held*, that she was barred of dower: *Freeland v. Freeland*, 128 Mass. 509. A wife, for the purpose of releasing dower, joined in her husband's conveyance, which the grantee failed to record, and afterwards a subsequent creditor of the husband recovered judgment against him, and the land so conveyed was sold on execution. *Held*, that though the prior conveyance was thus avoided, the right of dower was barred: *Morton v. Noble*, 57 Ill. 176; 11 Am. Rep. 7. An antenuptial settlement, wherein it was covenanted that the widow should receive a certain sum "in lieu of dower or her rights as widow in his estate"; and in full satisfaction of dower in his estate, "either in his real or personal estate": *Held*, to bar all claim, even for specific articles allowed to the widow by statute: *In re Young*, 27 Hun, 54. The holder of a mortgage in which the mortgagor's wife did not join foreclosed and sold, purchasing himself and conveying to a third party, and before such conveyance paid to a city (which had sold the land for taxes before the foreclosure and taken a deed of it) all sums due for taxes, interest, and expenses, and received from said city a quitclaim deed. *Held*, that this did not bar the dower of the mortgagor's widow: *Walsh v. Wilson*, 130 Mass. 124. A widow long delayed to apply for an assignment of dower, and for a while endeavored to give effect to the will of her husband, the scheme of

which, if fully carried out, would have involved a surrender of dower. *Held*, not to preclude her from claiming dower: *McLaren v. Clark*, 62 Ga. 106. Parties in contemplation of marriage entered into an agreement, in 1857, by which the intended wife was to retain possession of all her property free from all claim of her husband; and she fully renounced all claims to her intended husband's property. Upon the death of the husband, leaving minor children, *held*, that the wife was not entitled to dower, but to a homestead for the benefit of the children: *McGee v. McGee*, 91 Ill. 548. In 1857, M. left his family and residence in Cincinnati, went to California, and sent money to his wife until 1859, when she ceased to hear from him. In 1867, believing M. to be dead, she so represented to R., and thereby induced R. to accept a deed from herself and her two sons of M.'s house and lot. A few months afterwards, M. returned. *Held*, that she was estopped from treating her contract of sale as a nullity, and from asserting her right to have dower assigned upon M.'s actual death: *Rosenthal v. Mayhugh*, 33 Ohio St. 155. A devise was made by a husband to his wife of certain articles of personal property and forty pounds in money, "in lieu and stead of every other claim and pretension to his estate." It not appearing that the wife had accepted this bequest in lieu of dower, *held*, that it was no bar to her right to her dower at law: *Larrabee v. Van Alstyne*, 1 Johns. 307; 3 Am. Dec. 333. A grantor's wife did not join in the deed, but, in consideration of the payment of the purchase-money to her, promised orally never to claim dower in the land. *Held*, that her promise bound her and her heirs: *Dunlap v. Thomas*, 69 Iowa, 358. The widow unites with the heirs in a warranty deed conveying all the right, estate, and interest of the grantors, and reciting that the consideration was paid to all of them. *Held*, that the widow is estopped from asserting a claim to dower or homestead in the premises: *Reeves v. Brooks*, 80 Ala. 26. The wife of an insane man entered into a contract with his committee and his children, whereby she released her interest in his estate, including her dower, for about one third of his land, and agreed to execute the necessary releases, etc. *Held*, that her right of dower was barred, and that she was bound to release: *Jones v. Fleming*, 104 N. Y. 418; reversing 37 Hun, 227. A wife joined with her husband in a mortgage to secure money borrowed by him for the purpose of removing encumbrances from the land, and made thereon a waiver of dower. *Held*, that she was not precluded from demanding dower in the land after her husband's death: *Knox v. Higginbotham*, 75 Ga. 699. The New York statute provides that "in case of divorce dissolving the marriage contract for the misconduct of the wife, she shall not be endowed." A husband dom-

iciled in Illinois there procured a divorce from his wife for desertion. She appeared in the suit and filed an answer. *Held*, that she was not entitled to dower in land left by him in New York: *Van Cleaf v. Burns*, 43 Hun, 461. A wife relinquished her dower in land conveyed by her husband on condition subsequent. At the time of her husband's death, he had not declared a forfeiture for breach of the condition. *Held*, that the widow could not claim dower, even though the condition had not been performed: *Ellis v. Kyger*, 90 Mo. 600.

§ 776. **Assignment of Wife's Dower.** — Dower may be assigned to the widow by the heir or remainderman, or by the court, or the widow may sue for it, and for damages for its detention. The court, in some states, appoints commissioners, who set off the widow's dower by metes and bounds, or assign her one third of the rents and profits, or a sum absolute in lieu of her claims.¹ A widow needs no injunction to restrain a levy upon land in which she is entitled to dower, although dower has not been assigned her. Upon her giving notice, purchasers will buy at their peril.² Her dower right, although not admeasured, is absolute and assignable.³ She may proceed by way of admeasurement of dower, although she has already set up her claim in a suit for partition brought by the heirs, if no decree has been made in such suit.⁴ In an action for dower in part of a tract of land conveyed by the husband, improvements made by the husband's grantees on the demanded premises are not to be embraced in the estimate of value; but if the husband's immediate grantee has conveyed in severalty, the increased value by reason of improvements made by such grantees is to be reckoned.⁵ Dower may be assigned by parol.⁶ It may be assigned to the widow by a parol agreement between herself and the persons interested in the estate, followed

¹ See 1 Stimson's Statute Law, secs. 3271-3279; see note to *Austin v. Austin*, 79 Am. Dec. 604.

² *Spence v. Cox*, 64 Ga. 543; *Jackson v. Rainey*, 64 Ga. 311.

³ *Pope v. Mead*, 99 N. Y. 201.

⁴ *In re Hughes*, 3 Redf. 18.

⁵ *Boyd v. Carlton*, 69 Ma. 200; 31 Am. Rep. 268.

⁶ *Johns v. Fenton*, 88 Mo. 64.

by her occupatin of the assigned premises; and this so as to defeat seisin of the heirs *ab initio*.¹ Dower is assigned under the law in force at the time of the husband's death.² The unassigned dower interest is not subject to attachment.³ In the absence of a statute, equity cannot subject an unassigned right of dower to the payment of the widow's judgment debts.⁴ A widow in her suit for dower makes out a *prima facie* case by showing possession during the coverture. It is for the defendant to show a want of title.⁵ If when the widow seeks assignment of dower the land is held by different persons in several parcels, she is entitled to have her dower assigned in each parcel separately.⁶ A widow who renounces the provisions of her husband's will, and causes dower to be assigned to her, can recover, from the time of her husband's death to the time of her entry, the income derived from the property so assigned.⁷ Damages for non-assignment of dower pursuant to demand are recoverable, notwithstanding the refusal to assign was made in the utmost good faith, under belief that the claimant was not entitled thereto.⁸

§ 777. **Statutory Dower in the United States.** — The statutes of many states preserve dower exactly as at common law. In some, the widow is entitled to dower only in lands of which the husband died seised. In others, dower is abolished entirely, but the widow is entitled to a distributive share of the husband's estate.⁹

¹ *Gibbs v. Esty*, 22 Hun, 266.

² *Walker v. Deaver*, 5 Mo. App. 139.

³ *Rausch v. Moore*, 48 Iowa, 611; 30 Am. Rep. 412.

⁴ *Maxon v. Gray*, 14 R. I. 641.

⁵ *Stark v. Watson*, 24 S. C. 215.

⁶ *Thomas v. Hesse*, 34 Mo. 13; 84 Am. Dec. 66.

⁷ *Anstell v. Swann*, 74 Ga. 278.

⁸ *Nicoll v. Ogden*, 29 Ill. 323; 81 Am. Dec. 312.

⁹ See 1 Stimson's Statute Law, secs. 3271 et. seq.

CHAPTER XLV.

DISSOLUTION OF THE MARRIAGE BY DIVORCE.

- § 778. Deeds of separation — In general.
- § 779. Separate maintenance of wife.
- § 780. Divorces — The different kinds of — *A mensa et thoro* — *A vinculo*.
- § 781. Grounds for absolute divorce — Adultery.
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- § 802. Right of parties to remarry.
- § 803. Divorce from bed and board — Effect of on property and rights of the parties.
- § 804. Right of divorced spouse to sue the other.

§ 778. **Deeds of Separation—In General.**—Though there are cases which treat them as void, because against public policy,¹ yet the majority of the American cases hold that deeds for the separation of husband and wife are valid if their object be actual and immediate separation, and not a contingent or future separation.² Such

¹ *Collins v. Collins*, 1 Phill. Eq. 153; Pa. St. 110; *Loud v. Loud*, 4 Bush, 93 Am. Dec. 606; 453; *Dutton v. Dutton*, 30 Ind. 452;

² *Fox v. Davis*, 113 Mass. 255; 18 *Robertson v. Robertson*, 25 Iowa, 350; Am. Rep. 476; *Hitner's Appeal*, 54 McKee v. Reynolds, 26 Iowa, 578;

deeds do not require a consideration.¹ But it is essential that their provisions shall be fair and equitable.² Thus where the provision is for the benefit of wife and children, as in providing suitable maintenance during the separation, such a covenant or stipulation is certainly valid and binding.³ In a contract of separation, a stipulation by the husband to pay a certain sum for the wife's support, and that of the trustee to indemnify him from liability for her debts, are not contrary to public policy.⁴ A wife may enforce the conditions of a contract of separation, notwithstanding the husband may, before suit is brought, obtain a divorce.⁵ Where in a deed of separation of husband and wife, the former, with full knowledge of the latter's adultery, voluntarily covenants with her father, a party to the deed, to pay to her, for her personal support and maintenance, a certain sum annually during his life, such covenant is not avoided by a divorce *a vinculo matrimonii*, obtained at the instance of the husband; it may still be enforced.⁶ In an action by a wife for divorce for cruelty, an agreement of separation made two years before, after the acts of cruelty, and after actual separation, and substantially complied with by the husband, is a valid defense.⁷ The courts have refused to enforce a note exe-

Magee v. Magee, 67 Barb. 487; *Walker v. Beal*, 3 Cliff. 155; *Dupre v. Rein*, 56 How. Pr. 228; *Deming v. Williams*, 26 Conn. 226; 68 Am. Dec. 386; *Chapman v. Gray*, 8 Ga. 341; *Reed v. Beazley*, 1 Blackf. 97; *Bettle v. Wilson*, 14 Ohio, 257; *Goodrich v. Bryant*, 4 Sneed, 325; *McCubbin v. Patterson*, 16 Md. 179; *Beach v. Beach*, 2 Hill, 260; 38 Am. Dec. 584; *Griffin v. Banks*, 37 N. Y. 621; *Joyce v. McAvoy*, 31 Cal. 273; 89 Am. Dec. 172; *Walker v. Stringfellow*, 30 Tex. 570; *Gaines v. Poor*, 3 Met. (Ky.) 503; 79 Am. Dec. 559; *Rolette v. Rolette*, 1 Pinn. 370; 40 Am. Dec. 782; *Helms v. Franciscus*, 2 Bland, 544; 20 Am. Dec. 404. Voluntary agreements for separation between husband and wife are not authorized by the law; it merely tolerates such agreements when made

in such a manner, i. e., by the intervention of a trustee, that they can be enforced by or against a third person acting in behalf of the wife: *Rogers v. Rogers*, 4 Paige, 516; 27 Am. Dec. 85; *Stephenson v. Osborne*, 41 Miss. 119; 90 Am. Dec. 358.

¹ *Griffin v. Banks*, 37 N. Y. 621.

² *Switzer v. Switzer*, 26 Gratt. 574; *Randall v. Randall*, 37 Mich. 563; *Daniels v. Daniels*, 9 Col. 133.

³ *Fox v. Davis*, 113 Mass. 255; 18 Am. Rep. 476; *Randall v. Randall*, 37 Mich. 563; *Walker v. Walker*, 9 Wall. 743.

⁴ *Dupre v. Rein*, 7 Abb. N. C. 256.

⁵ *Andrus v. Randon*, 34 Tex. 536.

⁶ *Kremelberg v. Kremelberg*, 52 Md. 553.

⁷ *Squires v. Squires*, 53 Vt. 206; 38 Am. Rep. 668.

cuted by the husband to the wife, living separate from him, to induce her to return and live with him.¹

ILLUSTRATIONS.—Husband and wife, having agreed to separate, mutually covenanted that he would secure a separate maintenance to her through the intervention of trustees, and that she should be no further chargeable to him; that he would furnish money and testimony for the purpose of securing a divorce, for which there was ground, and that she would pursue the proper means to procure one, all which should be under his direction. *Held*, that this agreement was void: *Goodwin v. Goodwin*, 4 Day, 343. A husband and wife being about to separate, the wife bound herself not to molest him by suits at law, and he executed a settlement upon the children, and executed a bond conditioned for payment of a certain sum to her upon his death. *Held*, that the settlement and bond were valid and binding upon persons claiming under voluntary conveyances from the husband: *Picket v. Johns*, 1 Dev. Eq. 123. A husband and wife agreed to separate, and entered into a written agreement importing on her part a release to him of all future liability for her maintenance, and on his part, the gift to her of a house and lot; and the separation was in fact accomplished. *Held*, that such gift on his part and the effect of placing the property beyond his control, and vesting it in his wife for her separate use, impressed it with the character of separate estate: *Hiram v. Griffin*, 8 Bush, 262. An agreement for separation, executed between the husband, the wife, and A, provided that the husband should pay to A, for the wife, a certain sum yearly for her support and maintenance, and that A should indemnify the husband against the wife's debts, and should assure the performance of the husband's covenants. *Held*, a valid agreement, under which A might sue the husband; that the complaint need not state grounds for a divorce, and that the agreement was not annulled by a decree of divorce obtained by the wife in another state for a cause existing at the time of the execution of the agreement: *Clark v. Fosdick*, 13 Daly, 500.

§ 779. Separate Maintenance of Wife.—Where a married woman on account of the husband's fault is obliged to live apart from him, courts of equity have given her a portion of the rents and profits of her lands,²

¹ *Copeland v. Boaz*, 9 Baxt. 223; 40 Am. Rep. 89. Notes given by the husband to the wife in consideration of her discontinuing a suit for divorce and coming to live with him were held

valid in *Adams v. Adams*, 91 N. Y. 391; 43 Am. Rep. 675; *Phillips v. Meyer*, 82 Ill. 67; 25 Am. Rep. 295.

² *Corley v. Corley*, 8 Baxt. 7.

or of the chattels in her husband's house.¹ Separate maintenance may be granted to a deserted wife without regard to the obtaining of a divorce.² On a bill for separate maintenance, temporary alimony may be granted; this not being a merely incidental but a homogeneous part of the subject-matter of the suit.³ In California, the court, while refusing the wife a divorce, may require the husband to provide for her maintenance, it appearing that they cannot live happily together.⁴ Where a wife has been forced to leave her husband by his cruel conduct, she may come into equity to have secured to her a fair proportion of the rents and profits from land acquired by her since marriage and in his possession.⁵ To authorize a decree for separate maintenance of the wife other than for causes for which a divorce will be granted, it ought at least to be proved that there was a reasonable danger of personal violence to her, or a persistent, unjustifiable course of conduct on the part of the husband which would necessarily render her miserable if she continued to remain with him, and that his conduct was not in any considerable degree induced by her fault.⁶ A husband's divorce suit for desertion is not barred by the dismissal of his wife's suit for a separate maintenance. The question of whether she, without fault on her part, lived apart from him is not the same as the question of whether she willfully deserted and absented herself from him without reasonable cause.⁷ "Statutes provide more specific separate relief to a married woman living apart from her husband 'without her fault,'⁸ or where she is 'de-

¹ *Black v. Black*, 30 N. J. Eq. 215.

² *Van Arsdalen v. Van Arsdalen*, 30 N. J. Eq. 359; *Douglas v. Douglas*, 5 Hun, 140; *Garland v. Garland*, 50 Miss. 694; *Helms v. Franciscus*, 2 Bland Ch. 544; 20 Am. Dec. 402; *Almond v. Almond*, 4 Rand. 662; 15 Am. Dec. 781.

³ *Johnson v. Johnson*, 20 Ill. App. 495. Courts of equity in Alabama may grant alimony independently of a di-

vorice suit. And a wife's bill therefor may join those to whom, in fraud of her rights, the husband has conveyed property: *Hinds v. Hinds*, 80 Ala. 252.

⁴ *Hagle v. Hagle*, 68 Cal. 588.

⁵ *Corley v. Corley*, 8 Baxt. 7.

⁶ *Hunter v. Hunter*, 7 Ill. App. 253.

⁷ *Umlauf v. Umlauf*, 117 Ill. 580; 57 Am. Rep. 880.

⁸ *Schouler on Husband and Wife*, 485; *Deenis v. Deenis*, 65 Ill. 167.

served by' her husband; it may be sometimes by way of temporary alimony, or, again, of the beneficial use of property he has left behind him.¹ Whatever the mode or extent of relief thus afforded, the rule is, that the wife will not be entitled to a decree of maintenance unless she can make out a case which would have justified a decree of judicial separation.² It is not enough that the separation was voluntary and by mutual assent,³ or produced by the wife's own departure without sufficient cause. Nor can condoned misconduct of the husband be made the basis of her procedure.⁴ Alimony *pendente lite* is not properly allowed the wife who applies for separate maintenance."⁵

§ 780. **Divorces — Different Kinds of—A Mensa et Thoro — A Vinculo.**—Divorces are of two kinds, viz., from bed and board (*a mensa et thoro*), or from the bonds of matrimony (*a vinculo*). The former is a partial divorce only,—limited divorce; the latter is a final and complete divorce,—absolute divorce. Divorce cannot be granted if the parties have ceased to be husband and wife, though they were such at the commencement of the suit.⁶ An action for divorce abates by the death of either of the parties during the pendency of the suit.⁷ Where a decree affecting the property rights of the parties has been made, the decree may be reviewed, on appeal, after the death of one of them.⁸ Only the parties (husband and wife) can prosecute a divorce suit.⁹ But a suit for divorce may be prosecuted by or against the guardian or committee of an insane person, where the act was com-

¹ Stanbrough v. Stanbrough, 60 Ind. 275.

² Douglas v. Douglas, 5 Hun, 140; Black v. Black, 30 N. J. Eq. 215.

³ Cooper v. Cooper, 4 Ill. App. 235.

⁴ Deenis v. Deenis, 65 Ill. 167.

⁵ Foss v. Foss, 2 Ill. App. 411; Angelo v. Angelo, 81 Ill. 251.

⁶ Jones v. Jones, 108 N. Y. 415; 2 Am. St. Rep. 447.

⁷ Brocas v. Brocas, 2 Swab. & T. 303; Grant v. Grant, 2 Swab. & T. 522; Kimball v. Kimball, 44 N. H. 122; 82 Am. Dec. 194.

⁸ Israel v. Arthur, 6 Col. 85.

⁹ The infant children of divorced parents cannot file a bill to set aside the decree: Baugh v. Baugh, 77 Mich. 59; 26 Am. Rep. 495.

mitted before the party became insane.¹ Divorce *a vinculo* will not be decreed unless a legal marriage be proved.² A divorce will not be granted upon the testimony of young children of the parties.³ Where the husband has already obtained a divorce, the court may, in its discretion, grant a like divorce to the wife, for the purpose of making an ancillary decree securing to her proper portions of the common property.⁴ Equity will annul, at the suit of the widow, a judgment of divorce obtained by her husband in his lifetime on the ground of desertion, where it appears that the separation was voluntary, under written articles, and that the husband, by false representations, obtained service of process in the divorce suit by publication, where personal service could have been had.⁵

§ 781. **Grounds for Absolute Divorce—Adultery.**—In nearly all the states having divorce laws, adultery of either party is a ground for divorce.⁶ Positive or direct evidence is not necessary to establish adultery. Where from the circumstances proven no other inference can be drawn but that there was an improper intimacy or illicit connection between the parties, the fact of adultery will be considered as substantiated.⁷ But the proof must

¹ *Mordaunt v. Mordaunt*, L. R. 2 H. L. S. 374; *Baker v. Baker*, L. R. 5 P. D. 142; L. R. 6 P. D. 12; *Rathbun v. Rathbun*, 40 How. Pr. 328; *Mansfield v. Mansfield*, 13 Mass. 412; *Denny v. Denny*, 8 Allen, 311; *Garnett v. Garnett*, 114 Mass. 379; 19 Am. Rep. 369; *Cowan v. Cowan*, 139 Mass. 377. *Contra*, *Birdzell v. Birdzell*, 33 Kan. 433; 52 Am. Rep. 539; *Worthy v. Worthy*, 36 Ga. 45; 91 Am. Dec. 758; and see *Newcomb v. Newcomb*, 13 Bush, 544; 26 Am. Rep. 222; *Bradford v. Abend*, 89 Ill. 78; 31 Am. Rep. 67. And that the guardian of a spendthrift cannot file the bill: *Winslow v. Winslow*, 7 Mass. 412.

² *Mangue v. Mangue*, 1 Mass. 241; *Dobbs v. Dobbs*, 3 Edw. Ch. 377.

³ *Crowner v. Crowner*, 44 Mich. 180; 38 Am. Rep. 245.

⁴ *Stilphen v. Stilphen*, 58 Me. 508; 4 Am. Rep. 305.

⁵ *Johnson v. Coleman*, 23 Wis. 452; 99 Am. Dec. 193.

⁶ In England, fornication on the part of the husband does not stand—for obvious reasons—in the same category as adultery by the wife. Hence, to entitle the wife to a divorce, she must show cruel treatment in addition to fornication. A somewhat similar rule exists in Kentucky, North Carolina, and Texas: See 1 *Stimson's Statute Law*, 6202.

⁷ *Mehle v. Lapeyrollerie*, 16 La. Ann. 4; *Mosser v. Mosser*, 29 Ala. 313; *Inskeep v. Inskeep*, 5 Iowa, 204; *Adams v. Adams*, 17 N. J. Eq. 324; *Ferguson v. Ferguson*, 3 Sandf. 307; *Van Epps v. Van Epps*, 6 Barb. 320; *Anonymous*, 17 Abb. Pr. 48; *Bryant v. Bryant*, *Wright*, 156.

convince the mind affirmatively that actual adultery was committed. Nothing short of the carnal act can lay a foundation for a divorce. If a married woman is shown by undoubted proof to have been in an equivocal position with a man not her husband, leading to a suspicion of adultery, and it is proved that she had previously shown an unwarrantable predilection for that man; that they had been detected in clandestine correspondence, had stolen interviews, made passionate declarations; that her affections were alienated from her husband, and that her mind and heart were already depraved, and nothing remained wanting but an opportunity to consummate the guilty purpose,—then proof that such opportunity had occurred will lead to the satisfactory conclusion that the act has been committed. But when these circumstances are wanting, the proof of opportunity and equivocal appearances affords no evidence of adultery.¹ Adultery should be proved by evidence, and not by scandal; and where testimony is given of actions, which the witnesses interpret as criminal, the fact that they did not treat them as suspicious or criminal until long after their occurrence, when they had no further reasons for doing so, is strong proof that their later impressions are unfounded.² When divorce courts require adultery to be clearly proved before a divorce will be decreed for that cause, they do not merely mean that it must be clearly and directly sworn to, but that the proof must be entitled to and command belief. Evidence of a witness notoriously unchaste, and in her evidence untruthful and reckless, ought not to be sufficient to dissolve the marriage tie of a man against whose conduct for fidelity to his wife during the many years of their relation nothing else is shown.³ Courts will not ordinarily grant a divorce for adultery on the uncorroborated testimony of a *particeps criminis*.⁴ Evidence

¹ *Blake v. Blake*, 70 Ill. 618.

² *Soper v. Soper*, 29 Mich. 305.

³ *Clare v. Clare*, 19 N. J. Eq. 37.

⁴ *Payne v. Payne*, 42 Ark. 235.

that the husband had sometimes been shut up alone in the room with a woman generally reputed unchaste, with no explanation for the doors being locked, and all entrance to the house barred; that he visited her almost daily in the absence of her husband on no apparent business; that he paid her money, frequently met her at an eating-house, and often rode with her,—was held to warrant a verdict that he was guilty of adultery.¹ Where the evidence in an action for divorce rests on the unsupported testimony of the plaintiff's paramour, the case will be referred back to the referee for further evidence; the testimony of the paramour being subject to the same objection as that of any other accomplice.² Evidence of acts of adultery between libelee and his paramour committed after filing of a libel for divorce against him by his wife is competent to show the nature of the intercourse between them at the time when the adultery charged in the libel is alleged to have been committed.³ If all just suspicion of collusion is removed, a divorce may be granted on evidence of the defendant's confession of adultery.⁴ That the husband was affected with a venereal disease within six months after his marriage is not proof of adultery.⁵ A husband by bringing suit for divorce on the ground of adultery precludes himself from afterwards seeking a divorce on the ground of desertion. By proceeding for adultery he must be deemed to have consented to the separation; and especially where he admits that after learning of her adultery, he would not have taken her back.⁶ A bill for divorce praying discovery from the defendant, whether she has not committed adultery since her marriage with any person whatever, and with whom and at what time and place and under what circumstances, is

¹ *Daily v. Daily*, 64 Ill. 329.

² *Anonymous*, 5 Robt. 611; *Banta v. Banta*, 3 Edw. Ch. 295; *Brown v. Brown*, 5 Mass. 320.

³ *Thayer v. Thayer*, 101 Mass. 111; 100 Am. Dec. 110.

⁴ *Madge v. Madge*, 42 Hun, 524.

⁵ *Mount v. Mount*, 15 N. J. Eq. 162; 82 Am. Dec. 276.

⁶ *Ford v. Ford*, 143 Mass. 577.

demurrable. The rule is, that a defendant is not bound to accuse himself of a crime or to furnish any evidence whatever which shall lead to any accusation of that nature; and the objection lies to a particular interrogatory, though the bill be in other respects unexceptionable.¹

§ 782. **Conviction of Crime.** — Conviction for crime is a cause in many states. Under a law authorizing a divorce *a vinculo* on the conviction of husband or wife of felony, such conviction and punishment out of the state is not a ground.²

§ 783. **Cruelty.** — Cruelty of either party to the other is a ground in a number of states. The language of the statutes vary;³ hence we find the following phrases in them describing this ground for divorce, viz.: "Cruel, inhuman, and barbarous treatment"; "extreme cruelty"; "cruel and inhuman treatment"; such conduct on the husband's part towards his wife as renders it "unsafe and improper for her to cohabit with him"; "intolerable cruelty"; "extreme and repeated cruelty"; "cruelty of treatment"; "repeated cruelty"; "cruel or abusive treatment"; "so serious as to injure health or endanger reason"; "intolerable severity"; "excesses."⁴ As a general rule, what merely wounds the feelings is not legal cruelty.⁵ But Mr. Schouler says:⁶ "While that which merely wounds the feelings and produces mental sufferings falls short of legal cruelty, willful vexations, apart from physical menace or injury, which prey upon the health of a delicate spouse, and threaten bodily harm by

¹ Marsh v. Marsh, 16 N. J. Eq. 391; 84 Am. Dec. 164.

² Klutts v. Klutts, 5 Sneed, 423.

³ See 1 Stimson's Statute Law, 6205.

⁴ In Missouri, it is held that a divorce on the ground of indignities, such as to render the husband's condition intolerable, may be based on the excessive use of opiates by the

wife: Dawson v. Dawson, 23 Mo. App. 169.

⁵ Latham v. Latham, 30 Gratt. 307; Poor v. Poor, 8 N. H. 307; 29 Am. Dec. 664; Cooper v. Cooper, 17 Mich. 205; 97 Am. Dec. 182; Vanduzer v. Vanduzer, 70 Iowa, 614; German v. German, 57 Mich. 256.

⁶ Schouler on Husband and Wife, 508.

endangering the bodily health and unfitting for the duties of spouse, are usually treated at this day, especially if repeated and habitual after the harm it does is discovered, as amounting to legal cruelty such as to justify divorce on that ground."¹ A non-observance of common attention and ordinary courtesy, a heartless neglect, etc., however productive of domestic unhappiness, does not afford ground for divorce, there being no reasonable apprehension of actual violence.² A single act of violence is not legal "cruelty,"³ unless it is accompanied by circumstances indicating the probability of a repetition of it.⁴ The following have been held to come within one or another of these phrases: To consort with lewd females, or to make a brothel of his house;⁵ beating the wife;⁶ communicating to her a venereal disease;⁷ habitual personal violence;⁸ falsely charging the wife with unchastity,⁹ or the husband with adultery;¹⁰ forcing the wife to excessive sexual intercourse;¹¹ to expel a wife and a young and dependent step-daughter, and make their separation a condition of taking back the wife;¹² to wantonly neglect the wife in a critical illness, and to address her at such times in harsh and brutal language.¹³ Where the wife without cause has constantly and publicly charged the

¹ See *Morris v. Morris*, 14 Cal. 76, and note in 73 Am. Dec. 615; *Harratt v. Harratt*, 7 N. H. 196; 26 Am. Dec. 750; *Poor v. Poor*, 8 N. H. 307, and note to this case in 29 Am. Dec. 674-679; *Mahone v. Mahone*, 19 Cal. 626; 81 Am. Dec. 91; *Powers v. Powers*, 20 Neb. 529.

² *Wood v. Wood*, 80 Ala. 254.

³ *Hoshall v. Hoshall*, 51 Md. 72; 34 Am. Rep. 298; *Coles v. Coles*, 32 N. J. Eq. 547.

⁴ *Beyer v. Beyer*, 50 Wis. 254; 36 Am. Rep. 848.

⁵ *McClung v. McClung*, 40 Mich. 493.

⁶ *Taylor v. Taylor*, 76 N. C. 433.

⁷ *Cook v. Cook*, 32 N. J. Eq. 475; *Anonymous*, 17 Abb. N. C. 231.

⁸ *Johns v. Johns*, 57 Miss. 530.

⁹ *Jones v. Jones*, 60 Tex. 461; *Scott v. Scott*, 61 Tex. 119; *Bahn v. Bahn*, 62 Tex. 518; 50 Am. Rep. 539; *Smith v. Smith*, 8 Or. 101; *McMahon v. McMahon*, 9 Or. 525; *Kennedy v. Kennedy*, 60 How. Pr. 151; *Kelly v. Kelly*, 18 Nev. 49; 51 Am. Rep. 733; *Pinkard v. Pinkard*, 14 Tex. 356; 65 Am. Dec. 129; *Williams v. Williams*, 67 Tex. 198; *Eggerth v. Eggerth*, 15 Or. 626; *contra*, *Cheatham v. Cheatham*, 10 Mo. 296.

¹⁰ *Kelly v. Kelly*, 18 Nev. 49; 51 Am. Rep. 732; *Uhlmann v. Uhlmann*, 17 Abb. N. C. 236.

¹¹ *Melvin v. Melvin*, 58 N. H. 569; 42 Am. Rep. 605.

¹² *Friend v. Friend*, 53 Mich. 543; 51 Am. Rep. 161.

¹³ *Hoyt v. Hoyt*, 56 Mich. 50.

husband with unfaithfulness, disgracing him, and endangering his means of livelihood,—this is “extreme cruelty” in the wife.’

And the following have been held not within these terms: Negligence of the wife in household affairs;² using profane and insulting language to her husband;³ prosecuting the husband for an assault, without cause;⁴ placing his hand on his wife’s shoulder and requesting her to leave the room;⁵ simply breaking dishes, using grossly improper language, and threatening to kick the spouse from the house;⁶ an occasional outburst of passion, or mere abuse, however gross, apart from treatment in the presence of others;⁷ words of menace under circumstances not justifying a belief that the threat was serious and would be carried out; adultery or lewdness with other women, which the offending husband carries on clandestinely;⁸ mere neglect to supply food and clothing;⁹ a slight slap or push, not threatening bodily harm;¹⁰ denial of necessities or luxuries in general,¹¹ especially if there be no pecuniary resources; wantonly damaging a spouse’s property;¹² refusing marital intercourse, deserting the home or the nuptial bed, unnatural practices, and the like;¹³ mere ascerbity of temper, occasional reproaches on the part of the husband towards the wife, or even a threat of violence when none is offered;¹⁴ that a husband has repeatedly used harsh and profane language to his wife, and on one occasion choked her and threatened to do so

¹ *Whitmore v. Whitmore*, 49 Mich. 417.

² *Bennett v. Bennett*, 24 Mich. 482.

³ *Bennett v. Bennett*, 24 Mich. 482.

⁴ *Small v. Small*, 57 Ind. 568.

⁵ *Donald v. Donald*, 21 Fla. 571.

⁶ *Close v. Close*, 24 N. J. Eq. 338.

⁷ *Ruckman v. Ruckman*, 58 How. Pr. 278; *Evans v. Evans*, 1 Hagg. Const. 35; *Latham v. Latham*, 30 Gratt. 307.

⁸ *Miller v. Miller*, 78 N. C. 102.

⁹ *Faller v. Faller*, 10 Neb. 144. But to deliberately starve a wife, or with-

hold needful medical supplies, is different: *Butler v. Butler*, 1 Pars. Cas. 329; *Smedley v. Smedley*, 30 Ala. 714.

¹⁰ *Finley v. Finley*, 9 Dana, 52; 33 Am. Dec. 528.

¹¹ *Evans v. Evans*, 1 Hagg. Const. 35.

¹² 1 Bishop on Marriage and Divorce, 737.

¹³ 1 Bishop on Marriage and Divorce, 743.

¹⁴ *Shell v. Shell*, 2 Sneed, 716; *Vignos v. Vignos*, 15 Ill. 186; *Turbitt v. Turbitt*, 21 Ill. 438; *Hill v. Hill*, 2 Mass. 150.

again;¹ the mere neglect of a husband, with no circumstance of aggravation, to provide maintenance for his wife and children for fifteen years, during which she had supported the children from her own earnings;² a continual succession of petty annoyances, complaints, fault-finding, disparagement of his common sense, taste, and judgment;³ drunkenness alone;⁴ a single kick inflicted long before, and a blow which may have been accidental.⁵ Jealousy on a husband's part does not constitute such cruelty as to entitle the wife to a divorce, no malignant desire to harass or annoy her being shown.⁶

ILLUSTRATIONS.—A wife sought a divorce on the ground of cruelty. Actual personal violence had been practiced twice only, the last time four years before the institution of the suit. The parties had lived together continually, but for the whole of their married life the husband had been very unkind and unfeeling. *Held*, that a divorce should be decreed: *Sharp v. Sharp*, 116 Ill. 509. Abusive language and letters by a husband to his wife, in which he said that he did not believe their child was his, and charged her with being rotten at heart, and having procured abortions on herself, *held*, to constitute extreme cruelty: *Avery v. Avery*, 33 Kan. 1; 51 Am. Rep. 736. A wife, against her husband's objection, went to the house of her parents to be confined. The husband at first refused to go and see her after her confinement, but at last went, and then told her that if she did not return before the next week's newspaper was published, he would "advertise" her, indirectly charged her with incest with her father, and intimated that the child was her father's; and the wife not returning, he did advertise her desertion. *Held*, extreme and wanton cruelty warranting a divorce: *Palmer v. Palmer*, 45 Mich. 150; 40 Am. Rep. 461. A man violently seized his wife, cursed her, and drove her and her babe from the house, telling her not to return. His conduct before had been harsh, and hers exemplary. *Held*, that for this one act of cruelty she was entitled to a divorce: *Huilker v. Huilker*, 64 Tex. 1. The libellant was an industrious and exemplary woman. The respondent had be-

¹ *Embree v. Embree*, 53 Ill. 394.

² *Peabody v. Peabody*, 104 Mass. 195.

³ *Johnson v. Johnson*, 49 Mich. 639.

⁴ *Haskell v. Haskell*, 54 Cal. 262;

Coursey v. Coursey, 60 Ill. 186; *Waskam v. Waskam*, 31 Miss. 154; *Anonymous*, 17 Abb. N. C. 231.

⁵ *Shorediche v. Shorediche*, 115 Ill. 102.

⁶ *Boon v. Boon*, 12 Or. 437.

come very intemperate, and while under the influence of liquor he had abused the libelant, sometimes ejecting her from the house, and had used abusive language, charging her with a want of chastity. *Held*, sufficient to support a decree for a divorce: *Allen v. Allen*, 31 Mo. 479. A wife sent anonymous letters to her husband's clerk, falsely charging her husband with criminal intimacy with the clerk's wife, and sent similar letters to the newspapers. *Held*, extreme cruelty, justifying divorce: *Carpenter v. Carpenter*, 30 Kan. 712; 46 Am. Rep. 108. A husband, frequently drunken, chokes his wife, coarsely accuses her of unchastity, locks her up, and threatens to smash her head with a brick. *Held*, guilty of "such inhuman treatment as endangers her life," and entitles her to a divorce: *Wheeler v. Wheeler*, 53 Iowa, 511; 36 Am. Rep. 240. A husband's libel, charging that his wife for a long time had refused her bed to him, had continuously charged him, in the presence of their children, with adultery, had lost all interest in him, etc., to the loss of his peace of mind and endangerment of his health, *held*, good: *Holyoke v. Holyoke*, 78 Me. 404. A wife's bill for divorce alleges continuous ill-treatment, commencing shortly after marriage and culminating in a blow; that the husband threatened to whip the wife's child by a former marriage, when it was sick, and a year and a half old; that he locked his wife out of the house, and turned her away without providing for her support; and that his temper was habitually violent and ungovernable. *Held*, good: *Donald v. Donald*, 21 Fla. 571. On a libel for divorce against the husband, evidence of his familiarity and attentions to his half-sister, and refusal to send her away when requested by his wife, together with neglect of the wife's comfort and happiness, *held*, not to constitute cruel and inhuman treatment, and personal indignities rendering life burdensome within the Oregon statute: *Rickard v. Rickard*, 9 Or. 168. The Oregon statute makes cause for divorce "cruel and inhuman treatment or personal indignities rendering life burdensome." *Held*, that continued lewd and indecent conduct of the husband toward a young daughter of the wife by a former husband did not constitute a ground for divorce under the above provision: *Cline v. Cline*, 10 Or. 474. A wife deserted her husband and children for three months, while she went to Germany to learn painting. *Held*, that this was not such cruelty as entitled the husband to a divorce: *Smith v. Smith*, 62 Cal. 466. Repeated disagreements and quarrels, and the throwing of a paper by the wife which hit the husband in the eye. *Held*, not such inhuman treatment as to entitle the husband to a divorce: *Whaley v. Whaley*, 68 Iowa, 647.

§ 784. **Desertion.**—Desertion of either party by the other is a cause in many states. The phraseology of the statute varies in different states, as in the cause of cruelty; but “willful desertion,” “willful absence,” “willful, obstinate, and continued desertion,” or “willful and continued desertion,” are the terms usually used. In some states the desertion must continue for five years; in others three, in others two, in others one year. The desertion must be with willful intent on the part of the absent spouse.¹ “Willful desertion,” as used in regard to divorces, signifies an intentional desertion. It does not imply malice toward the other party.² It must be against the will of the other.³ A desertion is made out when it is shown that the absence has commenced and has continued during the prescribed period without the consent and against the objection of the other party.⁴ Desertion is a breach of matrimonial duty, and is composed,—1. Of the breaking off of the matrimonial cohabitation; and 2. Of an intent to desert in the mind of the offender. Both must combine to make the desertion complete. A mere separation by mutual consent is not desertion by either party.⁵ The separation of a husband and wife, acquiesced in by the wife, and which she did much to bring about, however long continued, does not constitute desertion to authorize a divorce on her petition. Such a separation, however, would become desertion from the time the complaining party makes sincere overtures to terminate it.⁶ A wife having left her home with her husband’s consent, with the intent of making a visit to her mother, her subsequent change of purpose and refusal to return will not convert such an absence into a willful desertion from

¹ Schouler on Husband and Wife, 515; Marsh v. Marsh, 14 N. J. Eq. 315; 82 Am. Dec. 251. ⁴ Benkert v. Benkert, 32 Cal. 467; Morrison v. Morrison, 20 Cal. 431.

² Benkert v. Benkert, 32 Cal. 467.

³ Kestler v. Kestler, 31 N. J. Eq. 197; Cooper v. Cooper, 17 Mich. 205; 97 Am. Dec. 182.

⁵ Latham v. Latham, 30 Gratt. 307.

⁶ Hankinson v. Hankinson, 33 N. J. Eq. 66.

the time of departure within the statutes.¹ The voluntary separation of a wife from her husband pending a suit for divorce against him on the ground of adultery is not desertion;² nor the refusal of sexual intercourse for even five years.³ Where a wife upon her husband's failure to support her separates from him and returns to her relatives with his consent, the separation is not willful and malicious desertion on his part, such as will entitle her to a divorce, although he has ceased to write to her or to answer her letters.⁴

The following have been held to amount to desertion: The willful and malicious declination by a wife to accompany her husband to a new home without any just or reasonable cause;⁵ failure by the husband to supply his wife with such necessities and comforts as are within his reach, and compelling her by cruelty to quit him.⁶ That a husband gambles, and does not properly support his wife, in consequence of which she leaves him, does not constitute desertion by him.⁷ Where a wife insists upon her husband leaving her because he will not support the family, his departure is not desertion.⁸ So where she refused to live with her husband because of his intemperance and improvidence, it is not an obstinate and willful desertion on his part.⁹ In order to justify the abandonment of the husband by the wife, his conduct toward her must have been such as would constitute the foundation of an action on her part for a divorce.¹⁰ A wife is not justified in law in abandoning her husband because he is rude and dictatorial in speech, exacting in his demands upon her, and

¹ *Conger v. Conger*, 13 N. J. Eq. 286.

² *Marsh v. Marsh*, 14 N. J. 315; 82 Am. Dec. 251.

³ *Southwick v. Southwick*, 97 Mass. 327; 93 Am. Dec. 95; nor is this "utter desertion" within a statute: *Stewart v. Stewart*, 78 Me. 548; 57 Am. Rep. 822.

⁴ *Ingersoll v. Ingersoll*, 49 Pa. St. 249; 88 Am. Dec. 500.

⁵ *Cutler v. Cutler*, 2 Brewst. 511.

⁶ *Levering v. Levering*, 16 Md. 213;

Washburn v. Washburn, 9 Cal. 475.

⁷ *Sandford v. Sandford*, 32 N. J. Eq. 420.

⁸ *Johnson v. Johnson*, 35 N. J. Eq. 20.

⁹ *Plimley v. Plimley*, 35 N. J. Eq. 18.

¹⁰ *Pierce v. Pierce*, 33 Iowa, 238.

sometimes unkind and negligent in his treatment of her, even when she was worn and weary in nursing their sick child.¹ Proof that a husband has lived apart from his wife, and has not supported her, does not establish willful, continued, and obstinate desertion, authorizing a divorce.²

ILLUSTRATIONS. — A wife in anger told her husband that he "might go his way and she would go hers," and gave other evidence of her desire that they should live separate, but immediately retracted and besought him not to go, and he, notwithstanding her entreaties, left her in a passion, and without any attempt at reconciliation, and without contributing anything towards her support, or even communicating with her in any way, remained away from her for three years, living all the time in the same county with her. *Held*, that she was entitled to a divorce for desertion: *Schanck v. Schanck*, 33 N. J. Eq. 363. Refusal without cause to occupy her husband's bed on the marriage night and leaving his house the next morning before breakfast, without the intention of returning, *held*, to constitute desertion: *Pilgrim v. Pilgrim*, 57 Iowa, 370. A husband moved all of the furniture out of the house where he and his wife were living, and left her there alone, and thereafter contributed nothing to her support, and had not communicated with her for three years prior to the suit. *Held*, that the wife was entitled to a divorce for desertion: *Williams v. Williams*, 35 N. J. Eq. 382. A husband and his wife were living with her father, who upbraided the husband for some trivial offense, whereupon the husband left the house, requesting his wife to go with him. She refused, and never afterwards offered to live with him or expressed any willingness to do so. *Held*, that her bill filed for divorce for desertion should be dismissed: *Mayer v. Mayer*, 30 N. J. Eq. 411. A wife declared to her husband, with whom she was living in her house, that he must leave the house or else she herself would; he not having been guilty of cruelty to justify her action, then left her. *Held*, not to be desertion: *Kestler v. Kestler*, 31 N. J. Eq. 197. A wife leaves her husband's house because of his threatening language and actions, upon which he publishes an advertisement that she has left his bed and board of her own free will, and warning the public against trusting her on his account, and never requests her to return. Her remaining absent under such circumstances, *held*, not desertion for which a divorce may be granted: *Rittenhouse v. Rittenhouse*, 29 N. J. Eq. 274. A wife left her husband because of his utter inability to maintain her, and after he had

¹ Carr v. Carr, 22 Gratt. 168.

² Bourquin v. Bourquin, 33 N. J. Eq. 7.

pledged all of her separate property, including her jewelry and silver plate, she declined to return to him until convinced of his ability to support her, and he apparently acquiesced in her determination. Six years later, she absolutely refused to live with him. *Held*, that prior to such refusal her conduct was not such desertion as to entitle him to a divorce: *Belden v. Belden*, 33 N. J. Eq. 94. A wife while away from her husband and residing with her relatives received a letter from him which said that he would not receive her; she did not return and try to obtain admission to his house, but filed a libel for divorce. *Held*, that this was not such a turning out of doors as would entitle her to a divorce: *Sowers v. Sowers*, 11 Phila. 213. A husband having abused his wife and shot at her, absconded, but was arrested and imprisoned. *Held*, that this was not "willful, continuous, and obstinate desertion" entitling her to a divorce: *Wolf v. Wolf*, 38 N. J. Eq. 128. A man before his marriage denied that he was subject to fits, and after marriage refused to have any one with him to protect his wife from her fright when he had them. Thereupon she left him. *Held*, not desertion entitling him to a divorce: *Neff v. Neff*, 20 Mo. App. 182. A husband and wife have never lived together, and the wife evinces a strong disinclination to live with her husband at all, and repulses his advances towards a reconciliation. Their consequent separation, *held*, not to be desertion: *Reece v. Reece*, 34 N. J. Eq. 32.

§ 785. **Impotence.** — Impotence existing at the time of marriage is a cause in some states.¹ In some, it must be incurable

§ 786. **Intoxication and Drunkenness.** — In some states gross and confirmed habits of intoxication is a ground. "Habitual drunkenness" is the language used in a few statutes. It must be continued for three years in some states, in others two, in others one. One is addicted to habitual drunkenness as ground for divorce who has a fixed habit of frequently getting drunk; and he may be so addicted though not oftener drunk than sober, and though sober for weeks at a time.² So is a fixed habit of drinking to excess to such a degree as to disqualify a person from attending to his business during the principal

¹ Not where it arises after marriage: *Brown v. Brown*, 38 Ark. 324.
Powell v. Powell, 18 Kan. 371.

portion of the time usually devoted to business.¹ An "habitual drunkard," within the meaning of that term as used in the Kansas divorce law, is one who has a fixed habit of drinking to excess, who frequently drinks to excess, who becomes intoxicated on every opportunity.² Evidence that a husband had been grossly intoxicated as often as three or four times a year for a period of twelve or fifteen years, and remained in that condition from seven to ten days on each occasion; that at such times he went or was sent to an asylum for inebriates; and that any undue excitement made him drink,—is sufficient to justify a finding that he had contracted such "gross and confirmed habits of intoxication" as entitled the wife to a divorce.³ So where a man for two years has been frequently, customarily, or habitually given to the excessive use of liquor, and has lost the power of controlling his appetite, though he may still have been able to attend to business, this is a ground for divorce.⁴ The statutes making habitual drunkenness cause for divorce does not embrace the case of excessive use of opiates. Only alcoholic drunkenness is meant.⁵

§ 787. **Other Statutory Causes.** — Other statutory causes for divorce exist in the different states. These are:⁶ Concealing a loathsome disease at the time of marriage, or contracting it afterwards, in Kentucky; failure of the husband to support the wife is a ground in some states;⁷ that the marriage was incestuous; in some,

¹ *Mahone v. Mahone*, 19 Cal. 627; *Hamaker v. Hamaker*, 65 Am. Dec. 81 Am. Dec. 91; *Wheeler v. Wheeler*, 53 Iowa, 512; 36 Am. Rep. 240.

² *Walton v. Walton*, 34 Kan. 195.

³ *Blaney v. Blaney*, 126 Mass. 205.

⁴ *Richards v. Richards*, 19 Ill. App. 466; see *Berryman v. Berryman*, 59 Mich. 605.

⁵ *Dawson v. Dawson*, 23 Mo. App. 169.

⁶ For a digest of the provisions of the statutes, see 1 *Stimson's Statute Law*, secs. 6200 et seq., and note to

⁷ The failure to furnish necessary medicine is a failure to furnish support: *Thompson v. Thompson*, 79 Me. 286. A divorce will not be granted for the husband's failure to provide necessities for his wife when he was unable to do so, though such inability resulted from his imprisonment as a punishment for crime committed by him: *Hammond v. Hammond*, 15 R. I. 40; 2 Am. St. Rep. 867.

that it was bigamous; in others, where the wife before marriage had been guilty of fornication unknown to the husband, in Maryland, and in a number of states, where she was at the time of marriage unknown to the husband *enccinte* by another man; or that she was a prostitute, in Virginia and West Virginia; or that the husband was a notoriously licentious person before marriage, and the wife was not aware of it; where the marriage was procured by fraud or force, in a number of states; where the parties being infants, the consent of the parents or guardians was not had, in a few; joining an immoral religious sect, in Kentucky, New Hampshire, and Massachusetts;¹ insanity at the time of marriage, in Georgia and Mississippi; or since the marriage, in Arkansas.² But occasional spells of insanity before marriage, and ultimate permanent insanity several years afterwards, together with evidence of hereditary taint in the family of the defendant, do not warrant a divorce.³ Lewd and lascivious behavior of the wife, without actual adultery, in Kentucky; the husband becoming a vagrant, in Missouri; and it is held, construing this statute, that any offense making one a vagrant within the criminal code is contemplated, and ground for divorce;⁴ for causes which in the discretion of the court make it best that the parties should not live together, in Connecticut and Wisconsin; voluntary separation of the parties for five years, in Kentucky and Wisconsin; where a husband or wife has not been heard from for three years, in New Hampshire; or for seven years, in Connecticut and Vermont. A single act of

¹ It being cause for divorce if the husband or wife "shall have joined any religious sect or society which professes to believe the relation of husband and wife to be unlawful, and refuses to cohabit with each other for the space of three years," it is none the less a cause for divorce if both have joined such society and afterward the husband has ceased to be a member

while the wife has refused to do so: *Fitts v. Fitts*, 46 N. H. 184; *Dyer v. Dyer*, 5 N. H. 271.

² Outside of a statute making it so, this is not a cause of divorce: *Hamaker v. Hamaker*, 18 Ill. 137; 65 Am. Dec. 705; *Powell v. Powell*, 18 Kan. 371; 26 Am. Rep. 774.

³ *Smith v. Smith*, 47 Miss. 211.

⁴ *Dwyer v. Dwyer*, 26 Mo. App. 647.

drunkenness and indecency of a wife is not such an indignity as will render the condition of the husband intolerable, within the meaning of the statute of Missouri.¹ The fact that a husband and a woman other than his wife have been daily companions, and have each avowed for the other entire affection, such association not being legally criminal, nor for the period required by the statute in case of desertion, does not constitute "gross behavior and wickedness, repugnant to and inconsistent with the marriage contract," within the meaning of the Rhode Island statute.²

ILLUSTRATIONS.—A wife petitioned for a divorce *a vinculo matrimonii*, alleging that her husband had committed a theft and had run away for the purpose of escaping punishment. *Held*, not an "outrage" within a statute: *Lucas v. Lucas*, 2 Tex. 112. A husband's abandonment of his wife for less than one year, and refusal meanwhile to furnish her adequate support, although able to do so, *held*, not to be "gross neglect of duty": *Smith v. Smith*, 22 Kan. 699. A woman had been married to a man for forty years, who then was seventy and feeble in body and mind, while she was fifty-five. She induced him to make over his property to her, and then turned him out of the house, and afterwards, upon his return, preferred against him a false charge of insanity. *Held*, that she was guilty of a gross neglect of duty within the meaning of that term as defined in the divorce act: *Osterhout v. Osterhout*, 30 Kan. 746.

§ 788. **Defenses to the Suit — Recrimination — Complainant also Guilty.** — It is a defense to a suit for divorce on the ground of adultery that the complainant likewise has committed adultery.³ Although adultery by the wife does not justify the husband in beating or ill-treating her, yet it is a bar to an application by her for a divorce on the ground of cruelty.⁴ In Michigan and Nebraska, there

¹ *Kempf v. Kempf*, 34 Mo. 211. *Aliter*, as to a single act of desertion: *Cannon v. Cannon*, 17 Mo. App. 390.

² *Stevens v. Stevens*, 8 R. I. 557.

³ 2 Bishop on Marriage and Divorce, 80; *Horne v. Horne*, 72 N. C. 531; *Hale v. Hale*, 47 Tex. 336; 26 Am.

Rep. 294; *Christianberry v. Christianberry*, 3 Blackf. 204; 25 Am. Dec. 96; *Smith v. Smith*, 4 Paige Ch. 432; 27 Am. Dec. 75; *Mattox v. Mattox*, 2 Ohio, 233; 15 Am. Dec. 547; *Peck v. Peck*, 44 Hun, 290.

⁴ *Schackett v. Schackett*, 49 Vt. 195.

can be no divorce for any cause when the other party was guilty of like conduct.¹ And this is held in other states on general principles.² A divorce will not be granted on the ground of extreme cruelty, where it appears that the party complaining willfully provoked the violence or misconduct complained of, unless such violence be extremely out of proportion to the provocation.³ Where a wife sues for divorce on the ground that her husband whipped her, he cannot justify by showing opprobrious or abusive language on her part, because it is not "like conduct."⁴ Under the statute allowing a divorce only to a party "injured," the adultery of the wife committed after a separation caused by default of the husband will not avail him to dissolve the bonds of matrimony.⁵ But the wife is entitled to a divorce where she deserts her husband with reasonable excuse, but her character during the separation is above reproach, while the husband during that time has been guilty of open and notorious adultery.⁶ An action for divorce by a husband upon the ground of voluntary desertion cannot be maintained, where it appears that the wife's abandonment was caused by unfounded accusations of unchaste conduct.⁷ But to a suit for divorce on the ground of adultery, desertion by the complainant is no defense.⁸ A divorce for desertion is granted against the party whose wrongful conduct caused the separation; and refused to such party when applying for it, although the other party has withdrawn from his society, and in that

¹ 1 Stimson's Statute Law, 6217; and see *Clapp v. Clapp*, 97 Mass. 531; *Edgerly v. Edgerly*, 112 Mass. 53; *Adams v. Adams*, 17 N. J. Eq. 324.

² *Hale v. Hale*, 47 Tex. 336; 26 Am. Rep. 294; 2 Bishop on Marriage and Divorce, sec. 74.

³ *Reed v. Reed*, 4 Nev. 395; *Von Glahn v. Von Glahn*, 46 Ill. 134; *Poor v. Poor*, 8 N. H. 307; 29 Am. Dec. 664; *Johnson v. Johnson*, 14 Cal. 459; *Skinner v. Skinner*, 5 Wis. 449; *Landes v. Jore*, 5 La. Ann. 32. A wife

is not entitled to a divorce on the ground of cruel treatment which is the result of her own misconduct: *Knight v. Knight*, 31 Iowa, 451.

⁴ *Gholston v. Gholston*, 31 Ga. 625.

⁵ *Tew v. Tew*, 80 N. C. 316; 30 Am. Rep. 84.

⁶ *Dupont v. Dupont*, 10 Iowa, 112; 74 Am. Dec. 378.

⁷ *Hardin v. Hardin*, 17 Ala. 250; 52 Am. Dec. 170.

⁸ *Richardson v. Richardson*, 4 Port 467; 30 Am. Dec. 538.

sense deserted him.¹ If a husband has repeatedly beaten his wife, she is entitled to a divorce, no matter what the provocation in words and actions may have been.² No less evidence is required to establish a recriminatory charge made in an answer than is required to establish a like charge in an original action for divorce.³

ILLUSTRATIONS. — H. applied for a divorce from his wife on the ground that she had been guilty of antenuptial incontinence with R., and of adultery with C. and others. It was admitted that H. had had carnal connection with his wife before his marriage. *Held*, that the antenuptial incontinence was no ground for a divorce, and that evidence thereof was not admissible to support the charge of adultery: *Hedden v. Hedden*, 21 N. J. Eq. 61. In a suit for divorce by a wife for cruelty, evidence that the husband and wife had had several altercations, in one of which she knocked him down and beat him severely, *held*, to show recrimination preventing her from obtaining the divorce: *Beck v. Beck*, 63 Tex. 34.

§ 789. **Condonation.**—Condonation is the conditional forgiveness or remission, by one spouse, of some matrimonial offense of which he or she knows the other to be guilty. And *while the condition of forgiveness remains unbroken by the former offender*, condonation, from whatever motive it may have proceeded, remains an absolute barrier to all divorce remedies founded on that particular grievance.⁴ Under the Michigan statute, a divorce cannot be had for habitual drunkenness, if the complainant was aware of this before marriage.⁵ Cohabitation with the guilty party, with knowledge or belief of its commission,

¹ *Lea v. Lea*, 99 Mass. 493; 96 Am. Dec. 772.

² *Hawkins v. Hawkins*, 65 Md. 104.

³ *Pollock v. Pollock*, 71 N. Y. 137.

⁴ *Schouler on Husband and Wife*, 536; *Burgeois v. Chauvin*, 39 La. Ann. 216; 2 *Bishop on Marriage and Divorce*, sec. 33; *Ferrers v. Ferrers*, 1 Hagg. Const. 130; *D'Aguilar v. D'Aguilar*, 1 Hagg. Ec. 773; *Johnson v. Johnson*, 4 Paige, 460; *Sewall v. Sewall*, 122 Mass. 156; 23 Am. Rep. 299; *Ridgway v. Ridgway*, 29 Week.

Rep. 612; *Rogers v. Rogers*, 122 Mass. 423; *Clouser v. Clapper*, 59 Ind. 548; *Warner v. Warner*, 31 N. J. Eq. 225; *Farnham v. Farnham*, 73 Ill. 497; *Nogees v. Nogees*, 7 Tex. 538; 58 Am. Dec. 78; *Harrison v. Harrison*, 20 Ala. 629; 56 Am. Dec. 227; *Smith v. Smith*, 4 Paige, 432; 27 Am. Dec. 75; *Cumming v. Cumming*, 135 Mass. 386; 46 Am. Rep. 476; *Lassiter v. Lassiter*, 92 N. C. 129; *Jones v. Jones*, 18 N. J. Eq. 33; 90 Am. Dec. 607.

⁵ *Porritt v. Porritt*, 16 Mich. 140.

is conclusive evidence of condonation.¹ Condonation by a husband of his wife's adultery may be presumed from his knowledge of facts likely to put him on inquiry and afford him knowledge.² An offer by a wife to return to the society of her husband is not a condonation, unless accepted by the husband.³ A husband whose wife has deserted him without cause, and remains away after realizing the folly of her act, need not attempt to induce her to return, where it is clear that the effort would be unavailing.⁴ Where a wife leaves her husband on account of his cruelty, and returns on his promise of amendment, his subsequent cruelty revives the original offense.⁵ Where, after a condonation of the adultery of the husband by subsequent cohabitation, the husband was convicted of felony, it was held that the right of the wife to sue for a divorce on the ground of the adultery was revived.⁶ To cancel the condonation, it is not essential that the original injury shall be repeated.⁷ In Massachusetts, the right to sue for a divorce for acts of cruelty which the wife had condoned was held to be revived by the conduct of the husband in refusing to speak to her for six weeks continuously, commencing only a fortnight after the act which has been condoned, although such conduct of itself would be insufficient to sustain a suit for divorce.⁸ In Louisiana, the plaintiff must prove, in an action for divorce predicated on a judgment of separation rendered one year previously, that meanwhile no reconciliation has taken place.⁹

ILLUSTRATIONS.—A wife, without justification, refused, for more than two years, to go with her husband to a new home

¹ 2 Bishop on Marriage and Divorce, 38; *Wagner v. Wagner*, 6 Mo. App. 572.

² *Maglathlin v. Maglathlin*, 138 Mass. 299.

³ *Betz v. Betz*, 2 Robt. 694; *Quarles v. Quarles*, 19 Ala. 363.

⁴ *Trall v. Trall*, 32 N. J. Eq. 231.

⁵ *Gordon v. Gordon*, 88 N. C. 45; 43 Am. Rep. 729.

⁶ *Hoffmire v. Hoffmire*, 3 Edw. Ch. 173.

⁷ *Langdon v. Langdon*, 25 Vt. 678; 60 Am. Dec. 297.

⁸ *Robbins v. Robbins*, 100 Mass. 150; 97 Am. Dec. 91.

⁹ *Van Hoven v. Waller*, 38 La. Ann. 903.

acquired by him, within a mile of the old homestead, which they had conveyed to her brother, and live with him there. *Held*, that his cohabiting with her on one occasion within the time, at her brother's house, while she still so refused, did not bar him of the right to a decree of divorce: *Kennedy v. Kennedy*, 87 Ill. 250. After a wife had ceased to live with her husband, and had commenced an action for a divorce, the husband, at an interview appointed to negotiate for a settlement, locked the room, and, against her will, and by the exercise of some force, had sexual intercourse with the wife. *Held*, that such fact did not constitute a condonation by the wife: *Harnett v. Harnett*, 55 Iowa, 45. The wife remained in the same house with her husband, cooking and washing for him until she obtained a divorce on the ground of his inhuman treatment. *Held*, not to be a condonation: *Harnett v. Harnett*, 59 Iowa, 401. The wife separated from the husband for causes which would entitle her to a divorce. She returned to him for the sole purpose of nursing him while he is suffering from a supposed mortal ailment. *Held*, not a condonation of past offenses, even though she remain with him thus for several years: *Guthrie v. Guthrie*, 28 Mo. App. 566.

§ 790. **Connivance — Consent.** — Nor will a divorce be granted where the injured party connived at the offense or consented to it.¹ And evidence that the husband was cruel, and that after his wife left him, though without cruelty on his part which would justify her leaving him, he declared she should not live with him again, is admissible to show that he was consenting to the desertion.² Connivance by a husband at his wife's adultery, on the ground of which a libel for a divorce filed by him is dismissed, is not an absolute bar to a libel for a prior act of adultery committed by her with another person, and not known to the husband at the time he brought the former libel.³ Where the visits of a married woman to a brothel are relied upon as affording evidence of adultery on

¹ *Cairns v. Cairns*, 109 Mass. 408; *Pierce v. Pierce*, 3 Pick. 299; 15 Am. Dec. 211. In a suit for divorce on ground of defendant's adultery in which defendant sought affirmative relief on ground of plaintiff's adultery, it was held that the fact that plaintiff had connived at defendant's adultery

did not prevent the latter from securing a divorce because of the former's adultery: *Bleck v. Bleck*, 27 Hun, 296.

² *Word v. Word*, 29 Ga. 281.

³ *Morrison v. Morrison*, 142 Mass. 361; 56 Am. Rep. 688.

which to base a decree of divorce, she may show that she was inveigled there by paid spies of her husband, and that she was innocent of the nature of the place.¹

ILLUSTRATIONS.—A husband was willing his wife should commit adultery if he could thereby obtain a divorce, and frequently left her alone with her suspected paramour, arranging for some one to watch them, suffered them to go on excursions alone, and permitted him undue familiarity with her. *Held*, such connivance as would prevent him from obtaining a divorce for her adultery: *Morrison v. Morrison*, 136 Mass. 310. A husband suspected his wife of being in the habit of committing adultery with a lodger in his house, when opportunity offered. To detect her he pretended to go away, thus affording to her an opportunity which but for his pretense she would not have embraced. *Held*, not connivance such as to bar his suit for divorce: *Robbins v. Robbins*, 140 Mass. 528; 54 Am. Rep. 488. It was conclusively proved that the wife of the libelee committed adultery in March, without her husband's connivance. *Held*, that he was entitled to a divorce although eight months afterwards he procured her again to commit adultery for the purpose of getting rid of her: *Woodward v. Woodward*, 41 N. J. Eq. 221.

§ 791. **Lapse of Time.**—Lapse of time in commencing proceedings may bar the suit.² The fact that a wife seeking a divorce on the ground of the impotency of her husband admits that she lived with him for ten years, and made no complaint of his impotency, may be considered as tending to show her allegation to be untrue.³ Eighteen years' delay in suing a husband for support is fatal to the suit, even though the wife originally left for cause, no excuse for the delay being given.⁴ But it is no bar to the suit of the wife for divorce that more than ten years elapsed between the time of her withdrawal from the society of her husband and the commencement of her proceeding against him, where she has continued to live separated from him and he has neglected to support her.⁵

¹ *Cane v. Cane*, 39 N. J. Eq. 148.

² *Lorenz v. Lorenz*, 93 Ill. 376.

³ *Schouler on Husband and Wife*

⁴ *Reed v. Reed*, 52 Mich. 117; 50

542. Expressly by statute in California.

Am. Rep. 247.

⁵ *Doan v. Doan*, 3 Pa. L. J. 7.

ILLUSTRATIONS.—The parties were married in 1865, and the wife resisted successfully for five years all efforts at intercourse. Some time afterwards her impotence was discovered, and complainant induced her to submit to an operation, which was performed, in 1877, without success. In 1879, complainant became satisfied that his wife was incurably impotent, and in 1880 he filed a bill for divorce on that ground. *Held*, that his claim to relief had not been forfeited by delay: *A. B. v. A. B.*, 34 N. J. Eq. 43.

§ 792. Collusion.—The statutes of many states provide that no divorce shall be granted, where it appears that the cause was occasioned by collusion of the parties for the purpose of obtaining a divorce. In California, collusion is defined as an agreement between husband and wife that one of them shall commit or appear or be represented in court as having committed acts constituting a cause of divorce for the purpose of enabling the other to obtain a divorce.¹ The wife may show, in defense to a charge of willful desertion alleged as cause for a divorce, that her husband had broken up housekeeping with a view of placing himself in such a position that he might claim a divorce for that cause.² Where the record suggests collusion, and there is no contest, and the evidence relied on to prove adultery is susceptible of a construction compatible with innocence, a divorce should be refused.³ A written agreement between husband and wife, made pending her application for divorce, that when the divorce should be granted she would pay him a certain sum for improvements made by him on her lands during marriage, is against public policy and void.⁴

§ 793. Other Defenses.—Insanity at the time the act was committed has been held a complete defense to a suit

¹ Neither party can obtain divorce where they separate by mutual consent: *Lea v. Lea*, 99 Mass. 493; 96 Am. Dec. 772.

² *Angier v. Angier*, 63 Pa. St. 450.

³ *Powell v. Powell*, 80 Ala. 595.

⁴ *Muckenburg v. Holler*, 29 Ind. 139; 92 Am. Dec. 345.

against a wife for divorce on the ground of adultery.¹ So where the ground is "cruelty" in the husband, his insanity at the time is a defense.² The refusal of the husband to allow the wife to attend church of which she is a member is not sufficient to justify the wife in separating from him.³ When a libel for desertion has been dismissed generally for insufficiency of proof, the libelant cannot maintain a subsequent libel for an adultery that was known to him when the first was brought, without showing a reason for its non-allegation then.⁴

§ 794. **Alimony — In General.** — Alimony is the allowance which a husband, by order of the court having due jurisdiction, must pay to his wife living separate from him for her maintenance. Alimony is of two kinds: alimony temporarily, or *pendente lite*, and permanent alimony.⁵ A court of equity has jurisdiction of a suit for alimony alone, and will grant the same in a proper case, though no divorce or other relief is sought.⁶ The supreme court will not entertain an application for alimony in a suit therein pending on appeal. Such application must be made in the trial court.⁷ A reversal of a decree of divorce does not necessarily reverse a decree for alimony, though both are a part of one entry in the trial court.⁸

§ 795. **Alimony Pendente Lite — When Allowed.** — Alimony *pendente lite* is allowed where the wife is plaintiff, and also, in some states,⁹ where she is defendant.¹⁰ A wife, defendant in an action for divorce, who does not set up a

¹ *Broadstreet v. Broadstreet*, 7 Mass. 474; *Wray v. Wray*, 19 Ala. 522; 33 Ala. 157; *Minnus v. Minnus*, 33 Ala. 98; *Nichols v. Nichols*, 31 Vt. 328; 73 Am. Dec. 352; *contra*, *Matchin v. Matchin*, 6 Pa. St. 332; 47 Am. Dec. 466.

² *Wertz v. Wertz*, 43 Iowa, 534; *Powell v. Powell*, 18 Kan. 371; 26 Am. Rep. 774; *contra*, *Smith v. Smith*, 33 N. J. Eq. 458.

³ *Lawrence v. Lawrence*, 3 Paige, 267.

⁴ *Bartlett v. Bartlett*, 113 Mass. 312; 18 Am. Rep. 493.

⁵ *Schouler on Husband and Wife*, 551; see note to *Methvin v. Methvin*, 60 Am. Dec. 665-682, for a full collection of the cases in alimony.

⁶ *Graves v. Graves*, 30 Iowa, 310; 14 Am. Rep. 525.

⁷ *Hunter v. Hunter*, 100 Ill. 477.

⁸ *Mangels v. Mangels*, 6 Mo. App. 481.

⁹ *Schouler on Husband and Wife*, 552.

¹⁰ *Schouler on Husband and Wife*, 552; *Frith v. Frith*, 18 Ga. 273; 63 Am. Dec. 289.

claim upon her part for a divorce is not entitled to alimony *pendente lite*.¹ To entitle a wife to alimony *pendente lite*, and for means to prosecute her suit, her petition should establish a *prima facie* case, and be supported by verification and affidavits; but the merits of the main controversy cannot be inquired into.² The refusal of permanent alimony by a jury does not preclude the court from ordering temporary alimony.³ It is not allowed where she has means of her own sufficient.⁴ Where a wife has succeeded, from her own means or on her own credit, in making her defense, she is not entitled to an allowance for counsel fees and expenses.⁵ The defendant cannot be ordered to pay money to plaintiff to enable her to prosecute an action to set aside a divorce.⁶ Alimony may be allowed in all suits for divorce, for restitution to conjugal rights, or for nullity, if the nullity be promoted by the husband, as soon as the court is informed that a marriage has taken place.⁷ In an action for divorce brought by one claiming to be a wife, alimony *pendente lite* and an allowance for expenses will not be allowed, where marriage in fact is denied by the answer, until the actual existence of the marital relation is proved or admitted. In passing upon the question of a marriage, however, the court is not confined to the allegation of the complaint and the denial of the answer. If the matter contained in other papers, or shown by legitimate proofs, make out, in the judgment of the court, a fair presumption of the fact of marriage, it has the power to grant alimony pending the action and expenses of the action.⁸ The defendant's refusal to pay temporary alimony should not deprive him of his right to defend the divorce suit.⁹

¹ *Reeves v. Reeves*, 82 N. C. 348.² *Daniels v. Daniels*, 9 Col. 133.³ *Gibson v. Patterson*, 75 Ga. 549.⁴ *Schouler on Husband and Wife*, 554; *Pinckard v. Pinckard*, 22 Ga. 31; 68 Am. Dec. 481; *Methvin v. Methvin*, 15 Ga. 97; 60 Am. Dec. 665.⁵ *Beadleston v. Beadleston*, 103 N. Y. 402.⁶ *Wilson v. Wilson*, 49 Iowa, 544.⁷ *North v. North*, 1 Barb. Ch. 241; 43 Am. Dec. 778.⁸ *Brinkley v. Brinkley*, 50 N. Y. 184; 10 Am. Rep. 460.⁹ *Baily v. Baily*, 69 Iowa, 77.

ILLUSTRATIONS. — In a suit for permanent support, the husband appealed from an interlocutory order requiring him to pay counsel fees. *Held*, that the trial court might order the payment of further counsel fees for the prosecution of the appeal: *In re Winter*, 70 Cal. 291.

§ 796. **Permanent Alimony — When Allowed.** — Permanent alimony is allowed where the decree is in favor of the wife, and the divorce is granted to her.¹ Where upon a wife's petition for a divorce she is found in fault, and a divorce granted to the husband on his answer, she is not entitled to permanent alimony.² It is not allowed where the husband obtains the divorce.³ A woman is not precluded from asking an Ohio court for alimony by the fact that she has obtained a divorce in another state, the court which granted the divorce having dismissed without prejudice her application for alimony, because personal service could not be obtained on the husband.⁴

§ 797. **Alimony — Amount of.** — The sum usually allowed is from one third to one half of the husband's income.⁵ One third of the annual profits of the husband's estate has been held a reasonable allowance;⁶ but in fixing the amount, the court is not limited to one third of the increase or product of the husband's property. Natural justice should require that when the wife has contributed equally with her husband to the accumulation of property she should have an equal right to its enjoyment.⁷ The court may grant a gross sum, or an annuity, based upon the value of the husband's property situated without as well as within the state, and such allowance will be a binding personal demand against him everywhere; or it may give the wife a sufficient part of the husband's

¹ Schouler on Husband and Wife, 553.

² *Shafer v. Shafer*, 10 Neb. 468.

³ 2 Bishop on Marriage and Divorce, 377.

⁴ *Woods v. Waddle*, 44 Ohio St. 449.

⁵ 2 Bishop on Marriage and Divorce, 544.

⁶ *Lockridge v. Lockridge*, 3 Dana, 28; 28 Am. Dec. 52.

⁷ *Ressor v. Ressor*, 82 Ill. 442.

property within the state.¹ Alimony should not be lavishly allowed where the wife is young and healthy, brought no property to her husband, and did not aid him in accumulating any, obtained a previous divorce for the purpose of marrying him, and lived with him only a short time.² Land is sometimes set off for permanent alimony, or a lien upon it decreed as security.³ A bond for maintenance or alimony may be taken.⁴ A husband's real estate cannot be set off to a wife in fee-simple for the purpose of giving her alimony. The court will only give the wife a lien upon the real estate for the amount of alimony decreed, or will set off a portion of it to her for life, if the husband desires her to be allowed a definite part of his property in preference to a periodical claim upon him.⁵ The times of payment of alimony should be so adjusted as to avoid, if possible, a sacrifice of the husband's property to pay the amounts allowed.⁶ A judgment in divorce, in so far as it provides alimony or other pecuniary allowance for the wife, may be modified by the court during the term at which it is rendered; but cannot be afterwards, except by express statutory authority.⁷ The right to alimony ceases on the death of the husband, and cannot afterwards be availably asserted, unless it has been ascertained and fixed by decree.⁸ As it continues only during the lifetime of the husband, or during the separation of the wife from him, it is therefore erroneous to decree it to her for the term of her life.⁹ The remarriage of a divorced wife to whom alimony has been granted is a valid ground for revoking or

¹ *Fischli v. Fischli*, 1 Blackf. 360; 12 Am. Dec. 251.

² *Cummings v. Cummings*, 50 Mich. 305.

³ *McClung v. McClung*, 42 Mich. 53; *Draper v. Draper*, 68 Ill. 17; *Galagher v. Fleury*, 36 Ohio St. 590; *Blankenship v. Blankenship*, 19 Kan. 159; *Wiggin v. Smith*, 54 N. H. 213. Rights of intervening parties must be respected in decreeing a lien: *Daniels v. Lindley*, 44 Iowa, 567.

⁴ *Miller v. Miller*, 64 Me. 484; *Guenther v. Jacobs*, 44 Wis. 354.

⁵ *Russell v. Russell*, 4 G. Greene, 26; 61 Am. Dec. 113.

⁶ *Farley v. Farley*, 30 Iowa, 353.

⁷ *Bacon v. Bacon*, 43 Wis. 197.

⁸ *Gaines v. Gaines*, 9 B. Mon. 295; 48 Am. Dec. 425.

⁹ *Lockridge v. Lockridge*, 3 Dana, 28; 28 Am. Dec. 52.

reducing alimony, it not appearing that the new husband is not able to support her.¹ The amount of temporary alimony to be granted is in the discretion of the court.²

ILLUSTRATIONS. — The husband's estate was worth seven thousand dollars, and consisted largely of a farm of one hundred and twenty acres. Alimony of four thousand dollars was allowed, but no provision was made for the maintenance and education of a minor child, the custody of which had been awarded to the mother. *Held*, that this allowance was excessive by fifteen hundred dollars: *Graft v. Graft*, 76 Ind. 136. Upon a suit for divorce it appeared that the husband was worth two thousand five hundred dollars, but that the wife had denied him conjugal privileges without reason. *Held*, that one hundred dollars was sufficient alimony: *Tumbleson v. Tumbleson*, 79 Ind. 558. A wife put six thousand dollars into the business of her husband, and he afterwards, when she was forced by his adultery to abandon him, clandestinely removed the stock of goods, worth fifteen thousand dollars, from New Orleans to Memphis, and at the filing of her bill for divorce was worth one hundred thousand dollars. *Held*, that a decree of twenty thousand dollars' worth of real estate as alimony was proper: *Stillman v. Stillman*, 7 Baxt. 169. A decree in a divorce suit allowed as alimony to the wife, in whose favor a divorce was granted, about six sevenths of the entire possession of husband and wife. *Held*, an excessive allowance, and that the alimony should be in the form of an annuity not exceeding one half of the income of all the property: *Wilson v. Wilson*, 102 Ill. 297. A decree for alimony gave the wife one half of the income from the husband's invested property, reckoned at five per cent, which the property then produced, and directed that the payments should be secured by mortgage, and should be extended through the wife's life, and that in case of change of circumstance, or for other good reason, the court might be applied to to change the award. *Held*, not error, except that the income of the invested property should be reckoned at four per cent instead of five: *Galusha v. Galusha*, 43 Hun, 181.

§ 798. **Enforcement of Decree for Alimony.** — The decree may be enforced by execution against the husband's estate, or by attachment, or the husband, failing to pay as ordered by the decree, may be committed for contempt.³

¹ *Stillman v. Stillman*, 99 Ill. 196;
39 Am. Rep. 21.

² *Campbell v. Campbell*, 67 Ga. 423.

³ *Grove's Appeal*, 63 Pa. St. 143.

A decree for alimony may be declared a lien on real property of the husband, even upon a homestead;¹ but a decree for partition of the husband's estate is not proper unless he refuses to give bond to secure to the wife the portion of the annual profits of his estate decreed to her as alimony;² but a husband may purge himself of contempt by showing actual inability, and surrendering what he has.³ One unable pecuniarily to pay alimony adjudged against him is not guilty of contempt of court in not paying it, where he has not voluntarily created the inability for the purpose of avoiding payment.⁴ A debtor cannot claim exemption of any property from execution on a judgment for alimony.⁵

ILLUSTRATIONS. — A husband was ordered to pay to his wife \$365 per year as alimony, she having obtained a decree of divorce. He afterwards became a bankrupt, and obtained his discharge, but continued to pay. He died. *Held*, that his estate could not be made liable for arrears: *Beach v. Beach*, 29 Hun, 181. A decree of divorce, awarding alimony to the wife, to be paid "by the husband out of his real and personal estate," *held*, not to create a charge on his real estate; after his death her only claim under the decree was that of a judgment creditor of his estate: *In re Lawton*, 12 R. I. 210. A husband brought a divorce suit, and was ordered to pay into court, within thirty days, a sum of money to enable his wife to defend. Owing to inability, he did not do this until the next term. *Held*, that it was error for the court to dismiss the suit: *Newhouse v. Newhouse*, 14 Or. 290. S. was convicted and imprisoned for arson, and his wife procured a divorce therefor, and the court granted her alimony. Before and in anticipation of the conviction and divorce, he fraudulently transferred his personalty to G. in trust for his wife so long as she remained his wife, and in case she procured a divorce, for his mother and brother. The defendant, F., attached the fund under a judgment which he had obtained against S. for burning his property. On interpleader by the trustee, *held*, that the transfer was void as to the wife, and the fund belonged to her by virtue of the decree for alimony, and that F.'s claim, being founded in tort, did not attach to it: *Green v. Adams*, 59 Vt. 602; 59 Am. Rep. 761.

¹ *Blankenship v. Blankenship*, 19 Kan. 159.

² *Blake v. People*, 80 Ill. 11.

³ *Galland v. Galland*, 44 Cal. 475;

⁴ *Lockridge v. Lockridge*, 3 Dana, 23; 28 Am. Dec. 52.

⁵ 13 Am. Rep. 167.

⁶ *Menzie v. Anderson*, 65 Ind. 239.

§ 799. **Effect of Divorce—Custody of Children.**—As to the custody of the children upon a divorce decree, the rules governing the custody of children in general are usually followed.¹

§ 800. **Effect of Absolute Divorce on Property of Spouses.**—Independently of statute, all transfers of property executed before divorce remain unaffected by it.² A bequest by a husband in favor of his wife is not avoided by a subsequent divorce for her fault.³ Separate property of the wife vested in her is not affected by the divorce.⁴ But although a wife, upon obtaining a divorce from her husband for his misconduct, is entitled to be placed, as regards her separate property, in the same position, as nearly as may be, as before the marriage, he cannot be required to account for rents of her separate estate received by him during the coverture.⁵ As to rights dependent on marriage, and not actually vested, a full divorce, or the legal annihilation, ends them. This applies to curtesy, dower, the right to reduce choses into possession, and property rights, under the statutes of distribution.⁶ All the husband's claims to the wife's lands, which depended on the marriage, become extinguished, and she is entitled to possession;⁷ and her statutory disability to alienate such lands is removed.⁸

ILLUSTRATIONS.—A and his wife leased separate property of the wife for a term of years, and the wife subsequently obtained a divorce from A. *Held*, that the interest of A terminated with the divorce, but that the lease was binding upon those claiming under the wife as devisees: *Emmert v. Hays*, 89 Ill. 11. J. B., being about to marry E. J., made his will as follows: "I give and bequeath to my intended wife, E. J., the sum of one thou-

¹ See Parent and Child, Title V.

² 2 Bishop on Marriage and Divorce, 705 et seq.

³ Card v. Alexander, 48 Conn. 492; 40 Am. Rep. 187.

⁴ Schouler on Husband and Wife, 560.

⁵ McGill v. McGill, 19 Fla. 341.

⁶ Dobson v. Butler, 17 Mo. 87; 4

Kent's Com. 53, n. 54; Given v. Marr, 27 Me. 212; Wheeler v. Hotchkiss, 10 Conn. 225; Calame v. Calame, 24 N. J. Eq. 440; Hunt v. Thompson, 61 Mo. 143; Rice v. Lumley, 10 Ohio St. 596; Howey v. Goings, 13 Ill. 95; 54 Am. Dec. 427.

⁷ Porter v. Porter, 27 Gratt. 599.

⁸ Piper v. May, 51 Ind. 283.

sand dollars, to be paid her within one year after my decease"; and directed the residue of his property to be equally divided among his children. Soon after the marriage, the wife abandoned her husband, who, for that reason, in due time procured a divorce. *Held*, that the will being positive and unconditional, E. J., after the death of the testator, without a revocation of the will, was entitled to the legacy according to the terms of the will: *Charlton v. Miller*, 27 Ohio St. 298; 22 Am. Rep. 307. A man settled property on his wife. Afterwards, she procured a divorce for his drunkenness and cruelty. There was no question of alimony. *Held*, that he had no claim to any part of the property so settled on her: *Stultz v. Stultz*, 107 Ind. 400. The Illinois statute declares that where a wife is divorced for her own misconduct, her dower or jointure, "and any estate" granted by the Illinois law in her husband's real or personal estate, shall be forfeited. *Held*, that she forfeits her homestead by a divorce decreed for her misconduct by the court of another state: *Rendleman v. Rendleman*, 118 Ill. 257.

§ 801. **On Other Rights.**—By the divorce, the husband's right of action for injury to himself suffered by an injury to his wife is lost.¹ And the husband cannot afterwards be sued for an injury committed by the wife.² By divorce, the husband loses his right to administer on the wife's estate.³ A woman who procures a divorce because of her husband's adultery does not become his widow after his death, and has no claim as such under the statutes of distribution.⁴ Courts have the same power over judgments in divorce suits as in other cases, and will vacate and set aside a decree that has been obtained by fraud or imposition.⁵ A decree of divorce obtained by fraud may be vacated at a subsequent term by the trial court, although a marriage was contracted on its faith, and issue born.⁶ A decree fraudulently obtained may be set aside although the rights of innocent third persons are thereby prejudiced; consequently the petition

¹ 2 Bishop on Marriage and Divorce, 724.

² *In re Ensign*, 37 Hun, 152.

³ *Adams v. Adams*, 51 N. H. 388; 12

⁴ *Capel v. Powell*, 17 Com. B., N. S., 743.

⁵ *Am. Rep.* 134.

⁶ *Schouler on Husband and Wife*, 560.

⁶ *Allen v. MacLellan*, 12 Pa. St. 328;

⁶ *51 Am. Dec.* 608.

need not allege that no such rights have intervened.¹ But a decree of divorce *a vinculo* cannot be set aside on the ground that it was obtained by false testimony and fraud, upon an original libel filed at a subsequent term of the court.² A voidable judgment cannot be attacked by strangers to the record. Infant children of divorced parents cannot set aside the decree of divorce.³

ILLUSTRATIONS.—A divorce was granted in a suit brought in the name of an insane wife, in confinement in an asylum in another state. On a bill filed on her behalf to set aside the divorce, alleging that it was procured by the fraud of the husband, *held*, that whether there was fraud, in fact or not, the law would presume fraud, and set aside such a divorce, no matter by whose advice it was obtained: *Bradford v. Abend*, 89 Ill. 78; 31 Am. Rep. 67. A man obtained a divorce from his wife at a former term of the court, by false testimony, on a libel of which she had no actual notice, knowledge of which he fraudulently kept from her, and of which the court had only apparent jurisdiction founded on his false allegation of domicile. *Held*, that the court had power to vacate the decree of divorce: *Edson v. Edson*, 108 Mass. 590; 11 Am. Rep. 393.

§ 802. **Right of Parties to Remarry.**—In most of the states, after a divorce is granted, either party may marry again at any time. In some, the guilty party cannot marry for a term, or in case of adultery, not at all. In others, neither party can remarry for a term; in others, not without the leave of the court.⁴ The provision of the New York statute forbidding the remarriage of a party divorced for adultery precludes remarriage even with the party who obtained the divorce. Such a marriage without leave of court is a nullity, and no rights can be based upon it; nor can it be pleaded in defense to a motion to enforce payment of alimony.⁵

§ 803. **Divorce from Bed and Board—Effect of on Property and Rights.**—The divorce from bed and board

¹ *Rush v. Rush*, 46 Iowa, 648; 26 Am. Rep. 179.

² *Greene v. Greene*, 2 Gray, 361; 61 Am. Dec. 454.

³ *Baugh v. Baugh*, 37 Mich. 59; 26 Am. Rep. 495.

⁴ 1 Stimson's Statute Law, 624.

⁵ *Moore v. Moore*, 8 Abb. N. C. 171.

does not, *ipso facto*, affect the property of the parties. The husband still inherits from the wife, and the wife from the husband; the one takes his curtesy, the other her dower; and even the right of reducing the wife's choses in action into possession still remains to the guilty husband.¹ But it is said, chancery, by virtue of its jurisdiction, in awarding the wife her equity to a settlement, may, and doubtless will, keep the property from his grasp, and do to both what justice demands.²

§ 804. Right of One Divorced Spouse to Sue Another.

— A divorced wife cannot maintain an action against her late husband upon an implied contract arising during coverture;³ nor for an assault committed on her.⁴ But she can recover for services rendered by her to her former husband before the marriage.⁵ And a divorced woman who had been compelled by her husband to submit to an attempt by a third person to produce a miscarriage cannot maintain an action against the third person therefor.⁶ A divorced wife cannot maintain an action against the husband for damages caused by his fraud in procuring the divorce, or having the marriage annulled.⁷

¹ *Clark v. Clark*, 6 Watts & S. 85; *Abbott v. Abbott*, 67 Me. 304; 24 *Kruger v. Day*, 2 Pick. 316; *Ames v. Am. Rep.* 27.

Chew, 5 Met. 320. ⁵ *Carlton v. Carlton*, 72 Me. 115; 39 *Am. Rep.* 307.

² *Schouler on Husband and Wife*, 562; citing *Holmes v. Holmes*, 4 Barb. 295. ⁶ *Libby v. Berry*, 74 Me. 286; 43 *Am. Rep.* 589.

³ *Pittman v. Pittman*, 4 Or. 298.

⁷ *Nicholson v. Nicholson*, 113 Ind. 131; *Blank v. Blank*, 107 N. Y. 91.

TITLE V.
PARENT AND CHILD.

TITLE V.

PARENT AND CHILD.

CHAPTER XLVI.

PARENT AND CHILD.

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§ 805. Who are Legitimate Children. — A legitimate child is one who is born in lawful wedlock and lawfully begotten. A child born in wedlock is presumed to be legitimate.¹ A child is legitimate if born within matrimony, though born within a week or day after marriage.² In most of the states, bastards are made legitimate by the subsequent marriage of their parents.³ The issue of a voidable as distinguished from a void marriage are legitimate.⁴ The New York statute provides "that if any person, whose husband or wife shall have absented himself or herself for the space of five successive years, without being known to such person to be living during that time, shall marry during the lifetime of such husband or wife, the marriage shall be void only from the time that its nullity shall be pronounced by a court of competent authority."⁵ And California has substantially the same law.⁶ Under the above section of the New York statutes it has been held that as the statute was remedial in its nature, it might properly be applied retrospectively.⁷ In one case,⁸ it was held that the statute did not make the marriage valid for any other purpose concerning property than that of preserving the inheritance of offspring from the competent parent, and that a wife thus marrying was not entitled to dower in the property of

¹ Upon a question of legitimacy, the declarations of a father that his son was illegitimate are competent evidence: *Barnum v. Barnum*, 42 Md. 251. Evidence of general reputation that a child is illegitimate is incompetent: *Haddock v. R. R. Co.*, 3 Allen, 298; 81 Am. Dec. 656.

² *Rhyne v. Hoffman*, 6 Jones Eq. 335.

³ *Schouler on Domestic Relations*, 226.

⁴ *Sneed v. Ewing*, 5 J. J. Marsh. 460; 22 Am. Dec. 41.

⁵ 2 Rev. Stats. 139.

⁶ Cal. Civ. Code, sec. 61.

⁷ *Brower v. Bowers*, 1 Abb. App. 214.

⁸ *Spicer v. Spicer*, 16 Abb. Pr. 112.

her second husband. But in another¹ it was held that as the statute only made the second marriage voidable, and not absolutely void, and that not until declared void by the decree of a court of competent jurisdiction, it remained good and legal for all purposes, and that either party surviving the other has a prior right to letters of administration. It can be declared void only on the application of one of the parties to it during the lifetime of the other, and cannot be declared void collaterally after the death of the first husband in actions instituted by creditors.² For the protection of the innocent children, many of the states in their statutes of descents and distributions have the clause providing that "the issue of all marriages deemed null in law. . . shall be legitimate."³

§ 806. *Child en Ventre sa Mere.* — An infant is regarded as *in esse* from the time of its conception,⁴ if it is subsequently born alive, and so far advanced towards maturity as to be capable of living;⁵ but a child born within six months is presumed incapable of living.⁶ A child *en ventre sa mere*, for purposes of inheritance, or where its benefit is to be furthered, is regarded as *in esse* and as capable of taking as though born at the time.⁷ Thus a

¹ White v. Lane, 1 Redf. 376.

² Cropsey v. McKinney, 30 Barb. 47.

³ Dyer v. Brannock, 66 Mo. 391; 27 Am. Rep. 359; Lincecum v. Lincecum, 3 Mo. 441; Graham v. Bennett, 2 Cal. 503; Cal. Civ. Code, sec. 1387.

⁴ Hall v. Hancock, 15 Pick. 255; 26 Am. Dec. 598; Marsellis v. Thalhimier, 2 Paige, 34; 21 Am. Dec. 66; Hone v. Van Schaick, 3 Barb. Ch. 488; Harper v. Archer, 4 Smedes & M. 99; 43 Am. Dec. 472.

⁵ Hone v. Van Schaick, 3 Barb. Ch. 488; Harper v. Archer, 4 Smedes & M. 99; 43 Am. Dec. 472.

⁶ Marsellis v. Thalhimier, 2 Paige, 34; 21 Am. Dec. 66.

⁷ Bingham on Infancy and Cover-
ture, 104; 2 Redfield on Wills, 3d

ed., 223; 2 Jarman on Wills, 5th Am. ed., 175; Wallis v. Hodson, 2 Atk. 115; Doe dem. Clarke v. Clarke, 2 H. Black. 399; Clarke v. Blake, 2 Bro. C. C. 320; 2 Ves. Jr. 673; Rawlins v. Rawlins, 2 Con. Ch. Cas. 455; Scatterwood v. Edge, 1 Salk. 229; Snow v. Stet, 1 Sid. 153; Trower v. Butts, 1 Sim. & St. 181; Long v. Blackall, 7 Term Rep. 100; Millar v. Turner, 1 Ves. Sr. 85; Burnet v. Mann, 1 Ves. Sr. 156; Thellusson v. Woodford, 4 Ves. Jr. 227; 11 Ves. Jr. 112; Beale v. Beale, 1 P. Wms. 244; Northey v. Strange, 1 P. Wms. 340; Burdet v. Hopegood, 1 P. Wms. 486; Crook v. Hill, L. R. 3 Ch. Div. 773; Pearce v. Carrington, L. R. 8 Ch. App. 969; Crisfield v. Storr, 36 Md. 129; Grace v. Rittenberry, 14 Ga. 232; Hall v.

child *en ventre sa mere* is included in the term "children,"¹ or "grandchildren,"² and in the term "persons living at the death" of a certain person.³

§ 807. **Rights and Disabilities of Illegitimate Children.**—At common law, the illegitimate child has few rights. He cannot inherit from his father, for he is regarded as *filius nullius*.⁴ Neither can he transmit property by descent, except to his own issue.⁵ But by statute in this country he is generally allowed to inherit from his mother, and in some states from his father also. To his mother, generally, belongs the right of his custody.⁶ The father is bound to support him, and may be arrested and forced to give bonds to do so.⁷ An illegitimate son of a woman takes equally with her legitimate children under a devise from her father to her for life, and at her death the property to be equally divided among her children.⁸ Bastards are not included in the word "children" in the statute of descents and distributions.⁹

ILLUSTRATIONS. — O. survived his sister and her only child, an illegitimate daughter. *Held*, that B., son of this illegitimate daughter of O.'s sister, could not inherit from or be a distributee in the estate of O. who died intestate and without descendants. It would be otherwise if the illegitimate daughter

Hancock, 15 Pick. 255; 26 Am. Dec. 598; Hone v. Van Schaick, 3 Barb. Ch. 488; Mason v. Jones, 2 Barb. 229; Stedfast v. Nicoll, 3 Johns. Cas. 18; Marsellis v. Thalhimier, 2 Paige, 34; 21 Am. Dec. 66; Jenkins v. Freyer, 4 Paige, 47; Petway v. Powell, 2 Dev. & B. Eq. 308; Starling v. Price, 16 Ohio St. 29; Swift v. Duffield, 5 Serg. & R. 38; Barker v. Pearce, 30 Pa. St. 173; 72 Am. Dec. 691; Laird's Appeal, 85 Pa. St. 339; Smart v. King, Meigs, 149.

¹ Petway v. Powell, 2 Dev. & B. Eq. 308; Crook v. Hill, L. R. 3 Ch. Div. 773.

² Smart v. King, Meigs, 149.

³ Rawlins v. Rawlins, 2 Con. Ch. Cas. 455; Burdet v. Hopegood, 1 P. Wms. 486; Barker v. Pearce, 30 Pa.

St. 173; 72 Am. Dec. 691; Groce v. Rittenberry, 14 Ga. 232.

⁴ Sneed v. Ewing, 5 J. J. Marsh. 460; 22 Am. Dec. 41; Norman v. Heist, 5 Watts & S. 171; 40 Am. Dec. 493.

⁵ Norman v. Heist, 5 Watts & S. 171; 40 Am. Dec. 493.

⁶ Wright v. Wright, 2 Mass. 109; Carpenter v. Whitman, 15 Johns. 208; Hudson v. Hills, 8 N. H. 417.

⁷ But at common law there is no obligation on a father to support a bastard: Simmons v. Bull, 21 Ala. 501; 56 Am. Dec. 257. His only liability is a prosecution for bastardy: Marlett v. Wilson, 30 Ind. 240.

⁸ Bennett v. Toler, 15 Gratt. 588; 78 Am. Dec. 638.

⁹ Porter v. Porter, 7 How. (Miss.) 106; 40 Am. Dec. 55.

had been legitimated by the marriage of her mother, and by recognition; or if O. had been illegitimate; or if his sister had survived him: *Berry v. Owens*, 5 Bush, 452.

§ 808. Age of Majority.—A person is an infant, and subject to the disqualifications of infancy, until he or she reaches the age of twenty-one years. In some states, by statute, a woman is of age at eighteen.¹ And in several states,—Iowa, Texas, and Louisiana,—all minors, whether male or female, attain their majority upon marriage. In Maryland, Oregon, and Nebraska, a woman on marrying is deemed of full age.²

§ 809. Adopted Children, and Adoption.—Adoption is the taking or choosing of another's child as one's own. It is permitted by statute in most of the states. The forms for adopting a child are simple and nearly alike in the different states. The consent of the child and of the natural parents are, as a rule, required.³ Where a statute

¹ These states are Arkansas, California, Illinois, Vermont, Ohio, Iowa, Minnesota, Kansas, Nebraska, Maryland, Missouri, Oregon, and Nevada: 1 Stimson's Statute Law, 6601.

² Stimson's Statute Law, 6601; see *Chubb v. Johnson*, 11 Tex. 469; *Kester v. Stark*, 19 Ill. 328; *Sparhawk v. Buell*, 9 Vt. 41; *Davis v. Jacquin*, 5 Har. & J. 100; *Cabo v. Endress*, 68 Mo. 224.

³ Under the Massachusetts statute, an adoption by a married couple must have the consent of both, and makes the child the child and heir of both. This is also the law in New Hampshire, Illinois, Maine, and Vermont. In California, married women are debarred the right to adopt. In Indiana, a husband may adopt a child without the wife joining: *Barnhizer v. Ferrell*, 47 Ind. 336. As to who may be adopted, the word used in the statutes of most states is "a child," which would refer to a minor, no doubt. In the Massachusetts law, the adopted must be younger than the adopter. In Vermont, the person may be a minor, or any other person of full age and sound mind, except a married woman.

In California, "the party adopting shall be fifteen years older than the minor"; and in Louisiana, the person adopting must be at least forty years old. These restraints follow closely the French law. The other states make no restrictions regarding the persons adopting children, except California, where he must be over twenty-one years old, and Iowa, where he must be competent to make a will. Relationship between the parties seems to affect the contract only in Massachusetts, while in the other states there would seem to be no restriction to a person adopting his nephew or niece, his brother or sister, or even his grandfather or wife. In some of the states, the law allows a person to adopt any child not his own, which would prevent the legitimizing of a bastard. In Louisiana, a person is prohibited from adopting "those illegitimate children whom the law prohibits him from acknowledging." In Vermont, a married woman cannot be the subject of adoption, nor in Massachusetts without the written consent of her husband. In the latter state, following the law which obtains there

expressly requires the consent of the parent, such consent is indispensable where such parent is not within the statutory exception as being hopelessly intemperate or insane, or having abandoned the child.¹ A parent by adoption sanctioned by the court has the same right as the natural parent to the custody of the child, as against a guardian.² In the case of an adopted child, while on the one hand so long as that relation continues the person who stands *in loco parentis* is not entitled to pay for support, on the other hand the person adopted can have no claim for services; and where her money, with her knowledge and consent, is applied to her use, after her majority, she cannot sue to recover it back.³ The word "child," used in a statute in relation to the adoption of children, must be taken to mean minor child, there being nothing to show that adults were included.⁴ Under a statute permitting a child to be adopted by a "person," a wife may join with her husband in adopting one.⁵

An adopted child inherits from its adopted parents the same as one born in wedlock;⁶ but adopted parents cannot inherit from adopted children as against blood relations; the property must follow the ordinary laws of descent;⁷ not even when the child obtained the property originally from the adopted parents.⁸ But it has been held that property coming to an adopted child who dies intestate, unmarried, and without lawful issue or their descendants, goes to the adopting parents, to the exclusion of the natural ones.⁹ Under the Illinois laws, an adopted

in regard to step-parents and step-children, no marriage can be contracted between any person and his or her adopted child. The rights of an adopted heir, under the Texas statute, are co-equal with the rights of the other heirs: *Eckford v. Knox*, 67 Tex. 200.

¹ *Luppie v. Winans*, 37 N. J. Eq. 245.

² *Rivos v. Sneed*, 25 Ga. 612.

³ *Brown v. Welsh*, 27 N. J. Eq. 429.

⁴ *In re Moore*, 14 R. I. 38.

⁵ *Krug v. Davis*, 87 Ind. 590.

⁶ *Burrage v. Briggs*, 20 Mass. 103; *Sewall v. Roberts*, 115 Mass. 262; *Barnhizel v. Ferrill*, 47 Ind. 355; *Hole v. Robbins*, 53 Miss. 514; *Newman's Estate*, 75 Cal. 213; 7 Am. St. Rep. 146.

⁷ *Hale v. Robbins*, 53 Miss. 514; *Commonwealth v. Nancrede*, 32 Pa. St. 389; *Schafer v. Ener*, 54 Pa. St. 304; *Barnhizel v. Ferrell*, 47 Ind. 355.

⁸ *Barnhizel v. Ferrell*, 47 Ind. 355.

⁹ *Davis v. Krug*, 95 Ind. 1.

daughter will not inherit from a real daughter as a sister would inherit in such case.¹ The adoption of a child by a married man does not make the child the heir of his wife.² Where articles of adoption are properly executed but not recorded during the lifetime of the person adopting, no right to inherit from him is thereby conferred on the child, though the latter has complied with the terms of such articles during his minority.³ Under the Massachusetts statute, an adopted child occupies the same position among the descendants of his adopting parent as though really born to him in lawful wedlock, except that he cannot take property expressly limited to the heirs of the body or bodies of the parents by adoption, nor property from the lineal or collateral kindred of such parents by right of representation. A most important provision in the new law in that state is the provision that, with two exceptions, in no grant, trust, settlement, devise, or bequest shall the term "child," or its equivalent, be held to include a child by adoption, unless it plainly appears to have been the intention of the settlor, grantor, or testator to include such adopted child. The exceptions are: 1. If the settlor, grantor, or testator be the adopting parent, the presumption will be the other way, and he must in terms exclude adopted children; and 2. The case of vested rights under previous laws. The same restriction as to entailed property exists in New Hampshire and Wisconsin, and as to right of representation, in Rhode Island, Illinois, and Oregon. In Vermont, Connecticut, Ohio, Indiana, Michigan, Iowa, Kansas, California, Pennsylvania, Tennessee unless restrained by the decree, North Carolina unless the petitioner especially desires the contrary, Georgia, and Texas,—the adopted child is clothed with all the rights and responsibilities of a legally procreated child. On the other hand, in Maine,

¹ *Keegan v. Geraghty*, 101 Ill. 26.

² *Shearer v. Weaver*, 56 Iowa,

³ *Sharkey v. McDermott*, 16 Mo. 578.
App. 80.

the statute says: "Such adoption shall not affect any rights of inheritance, either of the child adopted, or of the children or heirs of his adoptors." In Massachusetts, a person by being adopted does not lose his right to inherit from his natural parents or kindred. So, too, in Illinois and Ohio. So, of course, in Maine, as he cannot take from his adopted parent, he can from his natural kindred. In Connecticut, unless otherwise stipulated, "he shall not inherit estate from his natural parent."

ILLUSTRATIONS. — An instrument intended to effect the adoption of an infant was signed and acknowledged by his surviving parent. But the persons intending to adopt failed to execute it by reason of the illness of the justice in whose possession the instrument was, and the child resided with the intended parents for a year and a half. *Held*, that a legal adoption was not accomplished: *Long v. Hewitt*, 44 Iowa, 363. A written instrument for the adoption of a child was in all respects legal and binding, except that it was not filed for record, as provided by the Iowa code, until after the death of the party making the adoption. *Held*, that the child had not been legally adopted, so as to inherit as an heir of the deceased: *Tyler v. Reynolds*, 53 Iowa, 146. An adoptive child knew the adoptive father was of unsound mind, and with the view to become his heir, permitted the adoption. *Held*, not to show such fraud as would invalidate the order of adoption: *Brown v. Brown*, 101 Ind. 340. A father adopted two children of his daughter, and afterwards died, leaving no will. *Held*, that the children so adopted would inherit from him as his own children, and would also inherit the share of their deceased mother: *Wagner v. Varner*, 50 Iowa, 532. A died, leaving no issue, but having adopted an heir at law without the consent of his wife. *Held*, that the adoption in no way affected the interest of A's widow in his estate, as provided by statute, and that upon her death, her share of her husband's estate passed to her heirs: *Stanley v. Chandler*, 53 Vt. 619.

§ 810. **Step-children — Persons in Loco Parentis.** — A father is not entitled to the earnings of a step-child.¹ But where he voluntarily assumes the care and support of a step-child, he stands *in loco parentis* to the child, and the rules as to parent and child set out in the foregoing

¹ *Freto v. Brown*, 4 Mass. 675; *Worcester v. Marchant*, 14 Pick. 510.

and following sections apply to the relationship.¹ A father who has assumed the care and education of the illegitimate child of his daughter, the custody of the child having been abandoned both by the mother and father, will stand in reference to the child *in loco parentis*, and may maintain an action for its abduction.² One is not liable for the support of a step-child.³ A widow on her remarriage is not liable for the maintenance of a child by a former husband.⁴

§ 811. Duties of Parents — To Protect and Defend Child. — There is a legal duty resting upon a parent to protect and defend his child.⁵ This duty permits him to take part in and maintain his child's lawsuits without being guilty of maintenance;⁶ and will also justify an assault and battery in defending his children.⁷

§ 812. To Educate. — There is also a duty resting upon a parent to educate his child; and he may compel a public school to admit him if unlawfully excluded.⁸ A minor's mother, in the absence of the father, may direct the child's conduct, residence, education, occupation, and associates.⁹

§ 813. Maintenance and Support. — It is declared by statute in many of the states that it is the duty of the parent to provide for the maintenance of his children until they become of age. And it is usually made a penal offense for a parent to abandon his minor children or

¹ Schouler on Domestic Relations, 273; *Smith v. Rogers*, 24 Kan. 140; 36 Am. Rep. 254; *Gerdes v. Weiser*, 54 Iowa, 591; 37 Am. Rep. 229; *St. Ferdinand etc. Academy v. Bobb*, 52 Mo. 357; *Mowbry v. Mowbry*, 64 Ill. 383; *In re Dissenger*, 39 N. J. Eq. 227. ² *Moritz v. Garnhart*, 7 Watts, 302; 32 Am. Dec. 762.

³ *Gay v. Ballou*, 4 Wend. 408; 21 Am. Dec. 158; *Williams v. Hutchinson*, 5 Barb. 123; 3 N. Y. 312; *Barnes v. Ward*, Busb. Eq. 93; 57 Am. Dec.

590; *In re Besondy*, 32 Minn. 385; 50 Am. Rep. 579.

⁴ *In re Besondy*, 32 Minn. 385; 50 Am. Rep. 579.

⁵ Schouler on Domestic Relations, 234.

⁶ Schouler on Domestic Relations, 234.

⁷ Schouler on Domestic Relations, 234.

⁸ *People v. Board of Education*, 18 Mich. 400.

⁹ *In re Barré*, 5 Redf. 64.

neglect to support them.¹ A father, as against the public and his children, cannot escape the duty of providing for their support, even if they remain with their mother after her divorce,² or although by the decree of divorce the custody of infant children is given to the mother.³ His obligation to provide for his child is not affected by his wife's misconduct; and if he suffers the child to live with her separate from him, he thereby constitutes her his agent to contract for the child's necessities, and will be liable to those who furnish them upon his credit.⁴ Where an infant child escaped from its father through fear of personal violence and abuse, and could not safely live with him, the father was held liable for necessary support and education furnished to the child by a stranger.⁵ A widow is liable for necessities furnished to her minor child at her request, and the fact that the mother

¹ Stimson's Statute Law, 6608. That there is no legal duty at common law is held in *Kelly v. Davis*, 49 N. H. 176; 6 Am. Rep. 499. There is no such duty on the mother: *Fairmount v. R. R. Co.*, 54 Pa. St. 375; 93 Am. Dec. 714. In *In re Ryder*, 11 Paige, 185, 42 Am. Dep. 109, Chancellor Walworth said: "A parent who has the means is undoubtedly bound to support his or her minor child, that is, to afford the child a bare support. The law, however, gives to the parent a corresponding right to the services of the child while such support is afforded; for the parent is not bound to support his children in idleness, even if his property is sufficient to enable him to do so. The remedy to compel a parent to furnish necessities for his infant children is not by a petition to this court. The performance of that duty must be enforced by a proceeding under the statute, by an application to the general sessions for an order upon the parent for the support of his child, or a stranger may furnish necessities for the child and recover of the parent compensation therefor, where there is a clear and palpable omission of duty on the part

of the parent in supplying a minor child with necessities: *Van Valkenburgh v. Watson*, 13 Johns. 490; 7 Am. Dec. 395. And it seems that the neglect of a parent to provide for his infant child of tender years, and who is incapable of providing for himself, is an indictable misdemeanor: See *Rex v. Friend*, Russ. & R. 20. In the case under consideration, however, where the son is twenty years of age and in perfect health, so as to be able to support himself by his own industry, I doubt whether any court is authorized to compel his mother to furnish the means of obtaining a professional education, whatever may be the amount of her property. At least for the court of chancery over which I have the honor to preside I must disclaim the existence of such a power to control parental discretion."

² *Courtright v. Courtright*, 40 Mich. 633; *Gilley v. Gilley*, 79 Me. 292; 1 Am. St. Rep. 307.

³ *Holt v. Holt*, 42 Ark. 496.

⁴ *Gill v. Read*, 5 R. I. 343; 73 Am. Dec. 74.

⁵ *Stanton v. Willson*, 3 Day, 37; 3 Am. Dec. 255.

afterwards becomes insane does not change the liability.' A father is under no legal obligation to support an adult widowed daughter or her infant offspring.²

§ 814. Maintenance in Chancery where Child has Property. — Even where children have separate property of their own, the father must nevertheless maintain them himself, and he cannot charge their property with their support.³ But if the father is unable to maintain them, a court of chancery will order maintenance for them out of their own property.⁴ So if a mother has not means sufficient to maintain her child, an allowance from the child's estate may be granted her.⁵ A father holding a fund under a will for the support of his infant child, and able to maintain and educate her, may be allowed a reasonable sum for her support and education.⁶ A father will not be allowed, as administrator, credits for his infant daughter's maintenance, where each month she has had paid to her a sum sufficient therefor. If he, her natural guardian, has permitted her to squander it, he has been in fault.⁷ To entitle a father even to an inquiry as to the propriety of making an allowance to him for the past maintenance of his infant children, he must state a

¹ *Girls' Industrial Home v. Fritchey*, 10 Mo. App. 344.

² *Haynes v. Waggoner*, 25 Ind. 174.

³ *Myers v. Myers*, 2 McCord Ch. 214; 16 Am. Dec. 648; *Cruger v. Hayward*, 2 Desaus. 94; *In re Kane*, 2 Barb. Ch. 375; *Addison v. Bowie*, 2 Bland. 606; *Buckley v. Howard*, 35 Tex. 565; *Tanner v. Skinner*, 11 Bush, 120; *Harland's Case*, 5 Rawle, 323; *Tompkins v. Tompkins*, 18 N. J. Eq. 303; *Dupont v. Johnson*, 1 Bail. Eq. 279; *Walker v. Crowder*, 2 Ired. Eq. 478; *Haglar v. McCombs*, 66 N. C. 351; *Evans v. Pearce*, 15 Gratt. 513; 78 Am. Dec. 635; *Griffith v. Bird*, 22 Gratt. 73; *Johnson v. Johnson*, 2 Hill Ch. 277; 29 Am. Dec. 72; *Presley v. Davis*, 7 Rich. Eq. 105; 62 Am. Dec. 396; *Kinsey v. State*, 98 Ind. 351. But the mother's estate, where the

children have means, is not liable for their support: *Mowbry v. Mowbry*, 64 Ill. 383.

⁴ *In re Kane*, 2 Barb. Ch. 375; *Newport v. Cook*, 2 Ashm. 332; *Griffith v. Bird*, 22 Gratt. 73; *Beasley v. Watson*, 41 Ala. 234; *McKnight v. Walsh*, 23 N. J. Eq. 136; *Sparhawk v. Buell*, 9 Vt. 41; *Welsh v. Burris*, 29 Iowa, 186; *Trimble v. Dodd*, 2 Tenn. Ch. 500; *Holtzman v. Castleman*, 2 McAr. 555; *Burke v. Turner*, 85 N. C. 500. The court will not direct an allowance to the father of infants out of their estate when he is of sufficient ability to maintain them: *In re Walling*, 35 N. J. Eq. 105.

⁵ *Pennock's Estate*, 11 Phila. 75.

⁶ *Kendall v. Kendall*, 60 N. H. 527.

⁷ *Smith v. Smith*, 3 Demarest, 556.

special case, showing the extent of his means at the time such support was furnished, and the particulars of the extraordinary expenditures for the actual benefit of the infants which created an equitable claim in his favor.¹ Where a father having in his possession property of his infant children makes no application to the court during his lifetime to have the income of such property appropriated to their support, and makes no charge against them for their support or education, his estate, after his death, will not be allowed anything for their support, without the clearest proof that justice requires it. In such a case the father will be treated as a guardian, and his accounts will be settled on the principles applicable to guardians' accounts.² Although the income of an infant's real estate may be subjected to the payment of necessities, a father cannot so make a contract for the board and tuition of his infant daughter as to make her real estate itself liable for the debt thus created.³

ILLUSTRATIONS.—A wife bequeathed certain property to her husband as executor in trust for the support of her minor child. *Held*, that, notwithstanding his liability as parent, he was entitled to charge the support of the child to her separate estate: *Freeman v. Coit*, 27 Hun, 447. On the death of her husband, the widow, who was appointed executrix, simply received her separate estate of thirteen thousand dollars, the four minor children inheriting all their father's property, amounting to twenty thousand dollars, and she supported said children up to and after her second marriage until her death. *Held*, that, on settlement of her administration by her surviving husband, she was entitled to a reasonable amount for the support and education of the children, not exceeding the income of their property, and deducting the value of any services they might have rendered: *Englehardt v. Yung*, 76 Ala. 534.

§ 815. Rights of Parents — Correction and Chastisement. — The parent has a right to chastise the child in a moderate manner.¹ He must not, however, be cruel or

¹ *Smith v. Geortner*, 40 How. Pr. 185.

² *Evans v. Pearce*, 15 Gratt. 513; 78 Am. Dec. 635.

³ *Cox v. Storts*, 14 Bush, 502.

⁴ *Anderson v. State*, 3 Head, 455. So of a step-father: *State v. Alvord*, 68 N. C. 322; *Gorman v. State*, 42 Tex.

merciless, else he will be responsible to the law as for an assault and battery.¹ A father has no right to control or interfere with the rights of conscience of his minor child who has arrived at the age of discretion.² The authority which a parent has over a child is not limited by the law, except that it must not be exercised in such a manner as to endanger the child's safety or morals, and although the father may not compel his child, against the child's convictions of right, to become a member of any religious denomination, he may lawfully restrain the child from violating the religious obligations which he has taken. Thus where the child has become a member of any denomination, the father may restrain him from severing his connection with that denomination and joining another.³ By the civil law, in case of a difference between the parents as to the marriage of a child, the father's authority prevails, and he may disinherit the child for marrying without his consent.⁴

• § 816. **Custody of Children.** — At common law, the father had the paramount right to the custody of infant children. To this rule there was no exception, and the mother had no rights — the father being alive or having appointed a testamentary guardian — that the law would recognize.⁵ The court of chancery, however, early established the rule that it would interfere with the paternal

221; or any one standing *in loco parentis*: *Snowden v. State*, 12 Tex. App. 105; 41 Am. Rep. 667. A step-father is *in loco parentis* of his wife's children by a former husband so long as they are supported and maintained by him; and he has the same right of reasonable chastisement to enforce his authority: *Gorman v. State*, 42 Tex. 221.

¹ 2 Bishop on Criminal Law, 714; *Johnson v. State*, 2 Humph. 283; 36 Am. Dec. 323. The law will not interfere in the domestic government of families by punishing a parent for the correction of his child, however se-

vere or unmerited the punishment, unless it produces permanent injury, or is inflicted from malicious motives: *State v. Jones*, 95 N. C. 588; 59 Am. Rep. 282.

² *Commonwealth v. Sigman*, 2 Pa. L. J. 36.

³ *Commonwealth v. Armstrong*, 1 Pa. L. J. 146.

⁴ *Bosworth v. Beiller*, 2 La. Ann. 293.

⁵ *Brooke v. Logan*, 112 Ind. 183; 2 Am. St. Rep. 177; *Ex parte Hopkins*, 3 P. Wms. 151; *People v. Olmstead*, 27 Barb. 9; *Carr v. Carr*, 22 Gratt. 168; *Henson v. Walts*, 40 Ind. 170.

rights, where, on account of the gross misconduct of the father, the morals or the safety of the child would be endangered.¹ The American courts have gone further. In this country, while the father has the paramount right to the custody of his minor children, yet the welfare of the child is considered first and the claim of either parent last. Thus our courts are accustomed to vest the custody of the infant in the father or in the mother, according as it seems to be for the best interest of the child.² The father ordinarily, rather than the mother, is entitled to the custody of an infant child, and if he commits the child to the grandmother, she may keep it as against the mother.³ The father is to be preferred to a maternal grandmother,⁴ or the statutory guardian.⁵ The mother has no primary right to the custody of her son, where, her husband being dead, she has married again, so that the effect of awarding the boy to her guardianship will be to take him from the care of blood relatives willing to keep him, and bring him under the control of a step-father.⁶

¹ Schouler on Domestic Relations, 245, 246.

² Schouler on Domestic Relations, 248; *People v. Mercein*, 3 Hill, 399; 25 Wend. 101; 35 Am. Dec. 653; 38 Am. Dec. 644; *State v. Bratton*, 15 Am. Law Reg. 359; *Commonwealth v. Addicks*, 5 Binn. 520; *In re Ann Lloyd*, 3 Man. & G. 547; *Clark v. Bayer*, 32 Ohio St. 305; 30 Am. Rep. 593; *State v. Paine*, 4 Humph. 523-537; *Blissett's Case*, Loft, 748; *Rex v. Delavat*, 3 Burr. 1434; *Ex parte Fynn*, 12 Jur. 713; *Commonwealth v. Taylor*, 3 Met. 73; *Commonwealth v. Hammond*, 10 Pick. 274; *McDowell's Case*, 18 Johns. 323; *Commonwealth v. Briggs*, 16 Pick. 204; *People v. Mercein*, 8 Paige Ch. 55; *United States v. Green*, 3 Mason, 483; *State v. Stigall*, 22 N. J. L. 286; *State v. Richardson*, 40 N. H. 272; *Ex parte Woodward*, 17 Eng. L. & Eq. 77; *Archer's Case*, 1 Ld. Raym. 673; *Matter of Wollstonecraft*, 4 Johns. Ch. 80; *State v. Smith*, 6 Me. 462; 20 Am. Dec. 325; *In re Waldron*, 13 Johns. 418; *Ellis v. Jessup*, 11 Bush,

403; *Bush v. Bush*, 37 Ind. 164; *Linden's Estate*, Myrick Prob. 215; *State v. Libbey*, 44 N. H. 321; 82 Am. Dec. 223; *Merritt v. Swimley*, 82 Va. 433; 3 Am. St. Rep. 115. Under Iowa statutes the father has no right to the custody of a minor child paramount to that of the mother, the controlling consideration in determining to whom the custody shall be awarded, where a controversy arises, being the welfare of the child: *State v. Kirkpatrick*, 54 Iowa, 373. The father is entitled to the custody of the child in preference to the mother: *People v. Mercein*, 3 Hill, 399; 38 Am. Dec. 644; *State v. Paine*, 4 Humph. 523; *Steel v. Thacher*, 1 Ware, 91; *Johnson v. Terry*, 34 Conn. 259; *State v. Banks*, 25 Ind. 495; *People v. Olmstead*, 27 Barb. 9; *In re Kottman*, 2 Hill (S. C.) 363; 27 Am. Dec. 390.

³ *State v. Barney*, 14 R. I. 62.

⁴ *Miller v. Wallace*, 76 Ga. 479.

⁵ *Brooke v. Logan*, 112 Ind. 183.

⁶ *Spears v. Snell*, 74 N. C. 210.

And even in some cases, where it seems best for the infant, the custody may be given to a third person, and taken away from both parents.¹ The discretion of court respecting the custody of a child is a legal discretion, which should be guarded by the principles of law, and not by the notions and fancies of the court.² A motherless child, eight months old, living with its grandparents, will not be delivered to its father if its interests are best subserved by remaining with the grandparents.³ Under a statutory power to make, in a suit for divorce, such order for "the maintenance and education of the children of the marriage as may be just," the court may award the custody of such children to either parent.⁴ In a contest between husband and wife for the custody of their two children, aged five and six years, where there is no objection to the mother personally, it is for the welfare of the children, considering their tender years, that they be left with her. An inquiry as to the father's ill treatment of his wife is pertinent as bearing upon the father's right to take the children from their mother.⁵ In case of separation of husband and wife, equally fit by character and circumstances to have the custody of children, the custody of a delicate female child of four years of age will be awarded to the mother for the time being.⁶ So long as the infant is not in the custody of the father, the court will not, under some circumstances, exercise its discretion in his favor by giving custody to him; but if he already has the custody, it will not take it from him,

¹ *Clark v. Bayer*, 32 Ohio St. 305; 30 Am. Rep. 593; *Corrie v. Corrie*, 42 Mich. 509; *Blisset's Case*, Loft. 748; *Commonwealth v. Bigelow*, 1 Leg. Chron. 291; *Commonwealth v. Nutt*, 1 Browne, 143; *In re Welsh*, 74 N. Y. 299. Neither parent has any right to the custody of the child, if it is against the child's own welfare: *Corrie v. Corrie*, 42 Mich. 509. A child may be taken by the courts from both father and mother if necessary for its moral

training and education: *Lapitino v. Giglio*, 6 Phila. 304; *Commonwealth v. Nutt*, 1 Browne, 143.

² *Miller v. Wallace*, 76 Ga. 479; 2 Am. St. Rep. 48.

³ *Sturtevant v. State*, 15 Neb. 459; 48 Am. Rep. 349.

⁴ *Bennett v. Bennett, Deady*, 299.

⁵ *In re Pray*, 60 How. Pr. 194.

⁶ *McKim v. McKim*, 12 R. I. 462; 34 Am. Rep. 694.

unless he is guilty of neglect or abuse, or his conduct is such that there is probability of moral contamination.¹ The mere fact of illicit intercourse by the father will not be sufficient,² unless his conduct is so grossly immoral and his life so impure that the mind of the infant is likely to become poisoned by association with him;³ or unless the child is brought in contact with the woman with whom its father sustains immoral relations.⁴ The court may deprive the father of the custody of his minor children if he willfully neglects to provide professional medical attendance for them.⁵

In England, it has been held that a father in possession of an infant, even though but eight months old, would be entitled to retain it, as against the mother, so long as no neglect could be imputed to him.⁶ But in America, it is established that if the infant is of such tender age that its helpless condition and physical wants require the attention of the mother, the court will, looking to the necessities of the infant, award her the custody in preference.⁷ Where the child is of sufficient age, its wishes will generally be consulted by the court.⁸ In England, the rule seems to be, that within the period of nurture, — that is, until the age of fourteen, — the child's wishes will not be consulted; until that age the child, in judgment of law, is not of sufficient discretion.⁹ But in

¹ *State v. Paine*, 4 Humph. 523; Commonwealth v. Addicks, 5 Binney, 520; *People v. Mercien*, 8 Paige, 55; *State v. Stigall*, 22 N. J. L. 286.

² *Rex v. Greenhill*, 4 Ad. & E. 641; *In re Pullbrook*, 11 Jur. 185; *In re Fynn*, 12 Jur. 716; *R. v. Wilson*, 4 Ad. & E. 645.

³ *State v. Baird*, 18 N. J. Eq. 194.

⁴ *Wellesley v. Beaumont*, 2 Russ. 1; *State v. Baird*, 18 N. J. Eq. 194; *Cowls v. Cowls*, 4 Ill. 435; 44 Am. Dec. 708.

⁵ *Heinemann's Appeal*, 96 Pa. St. 112; 42 Am. Rep. 532.

⁶ *Rex v. DeManneville*, 5 East, 221; *Ex parte Skinner*, 9 Moore, 278; Commonwealth v. Briggs, 16 Pick. 204.

⁷ *State v. Bratton*, 15 Am. Law Reg. 359, citing *D'Hautville's Case*; *People v. Mercien*, 8 Paige, 55; 25 Wend. 64; 35 Am. Dec. 653; Commonwealth v. Addicks, 5 Binn. 520; *United States v. Green*, 3 Mason, 483; *State v. Stigall*, 22 N. J. L. 286; *State v. Paine*, 4 Humph. 523-534; *Matter of Wollstonecraft*, 4 Johns. Ch. 82; *In re Pray*, 60 How. Pr. 194.

⁸ *Schouler on Domestic Relations*, 250.

⁹ *Regina v. Clark*, 40 Eng. L. & Eq. 114; *Hyde v. Hyde*, 29 L. J. M. C. 150.

America, age is not the only criterion; the intelligence and capacity of the child to judge for itself will be considered, and its wishes consulted;¹ with due regard, however, to the natural feeling of the child to cling to those whom it has become accustomed to regard as its protectors.² But while the wishes of the child within the age of nurture will thus be consulted, they will not necessarily be followed, but will look to the interests of the child;³ and whatever may be its wishes, the court will never let it depart in obviously improper custody.⁴ But if the infant be of sufficient intelligence and capacity to declare an election, and there be no objection otherwise to the person chosen, the court will permit it to follow its own inclinations. The custody of children will not be given to the father if it be shown that they prefer to stay with the mother, and she can and will give them better education, support, and promotion of their well-being.⁵ An intemperate father cannot maintain *habeas corpus* for his child twenty months old, left by its dying mother in charge of her parents, who were well able to support it.⁶ On *habeas corpus* for the possession of a child, it should be intrusted, if in other respects its interests can be as well subserved, to the custody of a person of the same religion with its parents.⁷ The marriage of an infant

¹ Matter of Wollstonecraft, 4 Johns. Ch. 82; In re McDowells, 18 Johns. 328; State v. Bratton, 15 Am. Law Reg. 359; Commonwealth v. Hammond, 10 Pick. 274; People v. Chegaray, 18 Wend. 637; State v. Scott, 30 N. H. 274; People v. Pillow, 1 Sand. 162; State v. Richardson, 40 N. H. 276; People v. Wilcox, 22 Barb. 179; Curtis v. Curtis, 5 Gray, 537.

² Commonwealth v. Taylor, 3 Met. 73. Children aged thirteen and nine were consulted in People v. Chegaray, 18 Wend. 637; and of eleven and twelve, in Commonwealth v. Hammond, 10 Pick. 274; McDowell's Case, 18 Johns. 328; State v. Scott, 30 N. H. 274; while in Commonwealth v. Tay-

lor, 3 Met. 73, the wishes of one aged eight was disregarded; so also of one aged five, in State v. Baldwin, 5 N. J. Eq. 454; 45 Am. Dec. 397; also of one between three and four, in Commonwealth v. Briggs, 16 Pick. 204.

³ Commonwealth v. Briggs, 16 Pick. 204; People v. Mercien, 8 Paige, 57; State v. Natchway, 43 Iowa, 653; State v. Baird, 18 N. J. Eq. 194; 21 N. J. Eq. 384; but see State v. Baldwin, 5 N. J. Eq. 454; 45 Am. Dec. 397.

⁴ Commonwealth v. Taylor, 3 Met. 73.

⁵ In re Watson, 10 Abb. N. C. 215.

⁶ Ex parte Murphy, 75 Ala. 409.

⁷ In re Doyle, 18 Mo. App. 159.

terminates her father's right to her custody and services.¹ No action at law can be resorted to by a parent for the recovery of a child unlawfully detained from him; a writ of *habeas corpus* is the proper remedy.²

ILLUSTRATIONS. — A father places his daughter, thirteen years of age, under the care of a woman of notorious character living in a house opposite his own dwelling, and of whose reputation he could have advised himself without trouble. *Held*, that his conduct justifies the presumption that he is indifferent as to the interest of his child, and unfit to be trusted with her care and maintenance: *In re Clifton*, 47 How. Pr. 172. On the application of a father for the custody of his illegitimate child, it appearing that his moral character was no better than that of the mother, and that she had a natural affection for the child, neither neglecting, abusing, nor failing to provide for it, *held*, that the custody should not be awarded to him: *Pratt v. Nitz*, 48 Iowa, 33. A girl twelve years old who had lived for six years and been well treated as a member of the family of the respondent, a respectable householder, to whom she had been bound by the supervisors of the poor, was brought before the court by *habeas corpus*. At the time she went to live with him, she and her mother were inmates of a county poor-house, and her father, the petitioner, a convict in the state prison, and there was no evidence to show that he had since become morally and pecuniarily fitted to have the custody of the child. *Held*, that although the indentures under which respondent claimed such custody were void, the court might properly refuse to deliver the child to the father: *In re Goodenough*, 19 Wis. 274. A father transferred his motherless female infant to its aunts when it was a month old. The aunts cared for it suitably until it was twelve years old, when the father attempted to regain possession of it by *habeas corpus*. The child preferred to remain with its aunts. *Held*, that it should be permitted to do so: *Merritt v. Swimley*, 82 Va. 433. A mother executed articles of adoption of a child to defendant, who neglected to have them recorded for several years, during which time the mother married plaintiff, and executed articles of adoption to him, which he immediately recorded. *Held*, in an action for the custody of the child, that the question would be decided on the ground of the child's best interest, and not solely on the ground of legal parentage: *Fouts v. Pierce*, 64 Iowa, 71. Parents, being poor, orally gave their daughter at birth to the mother's sister, who well cared for and kept it for five years and a

¹ *Aldrich v. Bennett*, 63 N. H. 415; ² *Dowling v. Todd*, 26 Mo. 267.
56 Am. Rep. 529.

half. The father, having acquired wealth, the mother having died, applied for the child. The father was neither unkind nor immoral, but exhibited "a coldness, a lack of energy, and a shiftlessness of disposition," and proposed to put the child with his sister and mother, who had never seen it, the child's mother having been disowned or repudiated by the father's father. *Held*, that the application must be denied: *Chapsky v. Wood*, 26 Kan. 650; 40 Am. Rep. 321. The contest was between one proving herself to be the mother of an illegitimate female child eighteen months old, and the keeper of a house of ill-fame having possession of the child. *Held*, on *habeas corpus*, that its custody should be given to the mother: *In re Nofsinger*, 25 Mo. App. 116. A father gave his son, ten years of age, to a man of good character and ample means, to keep him during minority. The father dying three years afterwards, the mother brought *habeas corpus* for the child. *Held*, that she was entitled to his custody, although she was poor and dependent, and he preferred remaining with defendant: *Moore v. Christian*, 56 Miss. 408; 31 Am. Rep. 375. Parents have been divorced by the decree of a Wisconsin court for the fault of the wife, and the custody of the children had been decreed to the father. The children, respectively four and five years old, were in the care of the mother, living with her parents in Kansas, the latter providing well for them in an elegant home. The mother's conduct since the divorce had been irreproachable. The father was a traveling salesman, generally on the road, and having no home to offer to the children, except under the care of his mother or hired servants. On the petition of the father for the possession of the children, *held*, that they should be committed to the custody of the maternal grandmother, upon security to keep them in the jurisdiction of the court, and produce them when required, with leave to the father to visit them at her house, or take them away at any time, for a day, within the county, upon security to return them: *In re Bort*, 25 Kan. 308; 37 Am. Rep. 255. In an action of trespass to recover for personal injuries to a child, the alleged trespass being the placing of the child, by the defendant, in a buggy and driving off with her, when the horse took fright and ran away, throwing out the child, and causing the injury complained of, the defendant set up the permission of the mother to take the child. *Held*, that a plea, which merely alleged the permission of the mother, without averring any authority or circumstance implying an authority on the part of the mother to give such permission, was defective, as the mother as such is entitled to no disposing power over the person of the child, the father being the person entitled by law to the custody of his child: *Pierce v. Millay*, 62 Ill. 133. The divorce court awarded the children to the mother,

who afterwards died, leaving them to an uncle, who was appointed their guardian. *Held*, on *habeas corpus*, that they would not be given to the father, he having done nothing for their support, and it not appearing that their interests would be promoted by their being in his charge, but on showing his fitness, he might recover their custody: *Bryan v. Lyon*, 104 Ind. 227; 54 Am. Rep. 309.

§ 817. **Contracts Transferring Parental Rights.**—In England and in some of the states, an agreement by which a father surrenders custody of his child may be revoked by him at any time. If the party to whom it has been transferred refuses to deliver it, he may obtain possession by *habeas corpus*.¹ Other courts, however, have refused to deliver the child to the father, where it appeared that it would be better for the child to remain where it was.² Under a surrender of a child by its mother to the trustees of an orphans' institution which specifies no particular time for retaining the child in the institution, the mother is entitled to reclaim the child at any time. The contract is not obligatory on either party for any definite period.³

ILLUSTRATIONS.—The mother of a fatherless child twenty months old gave it to her parents "to raise" until the death of the grandmother. The child being well cared for, *held*, that the mother could not recover the custody of it before the happening of that event: *Bonnett v. Bonnett*, 61 Iowa, 198; 47 Am. Rep. 810. A child three years of age was in the custody of its maternal grandmother, who had, with its father's consent, taken it, a motherless infant of two days old, and had brought it up. *Held*, on *habeas corpus* by the father, who showed himself to be a moral man, with means of discharging his parental obligations, that the custody of the child would not be disturbed, the father, who had married again, showing no urgent necessity

¹ *Regina v. Smith*, 16 Eng. L. & Eq. 221; *Schouler on Domestic Relations*, 251; *Torrington v. Norwich*, 21 Conn. 543; *People v. Mercien*, 3 Hill, 410; 38 Am. Dec. 644; *State v. Baldwin*, 5 N. J. Eq. 454; 45 Am. Dec. 399; *Brooke v. Logan*, 112 Ind. 183; 2 Am. St. Rep. 177. The transfer must be by deed; a parol agreement is revocable: *State*

v. Libbey, 44 N. H. 321; 82 Am. Dec. 223; *Brooke v. Logan*, 112 Ind. 183; 2 Am. St. Rep. 177.

² *Pool v. Gott*, 14 Law. Rep. (Mass.) 269; *State v. Barrett*, 45 N. H. 15; *Bently v. Terry*, 59 Ga. 555; 27 Am. Rep. 399.

³ *Wishard v. Medaris*, 34 Ind. 168.

for present action: *Verser v. Ford*, 37 Ark. 27. A mother, after the death of her husband, placed her children under the charge of an orphan asylum duly authorized to receive such children. Upon her death, *held*, that their relatives have no right to interfere, where there is no failure of duty on the part of the asylum: *Com. v. St John's Orphan Asylum*, 9 Phila. 571. A father, whose wife had died, gave his child, when three years old, to the child's aunt, with whom she remained six years, the father, during that period, visiting her but once a year and contributing nothing to her support. *Held*, that his right to claim the child was gone: *Com. v. Dougherty*, 1 Leg. Gaz. 63. A married woman took her sister's child, three years of age, into her own family, and nursed and supported her for five years, the parents having agreed to give her the child. On *habeas corpus* by the parents, *held*, that the contract was valid and should be enforced, the respondent's husband having acquiesced in it, and joining her in defense of the suit: *Bently v. Terry*, 59 Ga. 555; 27 Am. Rep. 399. A child, three years old, on the death of its mother, was, by his father, sent to the wife's parents to be brought up by them. *Held*, that the father's application, two or three years afterwards, for his custody should not be granted, unless he could show that he was able and likely to make suitable provision for it: *Drumb v. Keen*, 47 Iowa, 435. A married woman, separated from her husband by reason of his intemperance and crime, being unable to support her children, gave them up to the managers of a home for destitute children, under a written contract by which the children were to be placed in a good family to be educated, the mother agreeing not to seek to discover or take them away. *Held*, upon *habeas corpus* brought by the parents to recover the children, that the contract was valid: *Dumain v. Gwynne*, 10 Allen, 270. A husband on the death of his wife gave their babe to the mother's parents, at their request, to care for it "until at least she passes her first decade in life." Marrying again, he demanded the child, then about seven years old, but the grandparents refused to surrender it. The child had been well cared for at the expense in part of the grandparents, and the father was able to maintain it, and a proper person to have the custody of it. *Held*, that the father was entitled to the custody: *In re Scarritt*, 76 Mo. 565; 43 Am. Rep. 768.

§ 818. Labor and Earnings of Child. — The father is entitled to the value of the child's labor and services until he becomes of age.¹ And in like manner he is entitled to

¹ Reeve on Domestic Relations, 290; Etna, 1 Ware, 462; Nightingale v. Gale v. Parrot, 1 N. H. 28; The Withington, 15 Mass. 272; 8 Am.

the child's earnings, and may sue his employer for them;¹ and they are liable to the creditors of the father.² A father is entitled to a bounty received by an infant son on enlisting in the army;³ so he may sue in admiralty for wages of his minor son as a seaman.⁴ A parent can maintain an action for services against a corporation which knowingly hires and keeps in its employ a minor child of such parent against the latter's will.⁵ A father may recover compensation for services performed by his minor son in unlawfully selling intoxicating liquors, if he did not know the character of those services while his son was performing them.⁶ A mother's right to her minor child's services ceases when she remarries, and the child is supported by its step-father.⁷ A parent hiring out her minor son at a stipulated rate is not affected by his agreement to work for a less rate.⁸ Desertion by a seaman after attaining his majority cannot forfeit the father's right to wages earned by him during the latter part of his minority.⁹ An employer sued by the father of his minor servant for wages earned by the latter, and claimed by the plaintiff in his right as father, was allowed, under the

Dec. 101. After the death of the father, the mother is entitled to his services and earnings: *Hammond v. Corbett*, 50 N. H. 501; 9 Am. Rep. 288; *Campbell v. Campbell*, 11 N. J. Eq. 272; *Dedham v. Natick*, 16 Mass. 135; *Furman v. Van Sise*, 56 N. Y. 435; 15 Am. Rep. 441; *Matthewson v. Perry*, 37 Conn. 435; 9 Am. Rep. 339; *Simpson v. Buck*, 5 Lans. 337; *Kennedy v. R. R. Co.*, 35 Hun. 186. The earlier cases did not recognize the right of the mother: See *Com. v. Murray*, 4 Binn. 487; 5 Am. Dec. 412; and see *Fairmount v. R. R. Co.*, 54 Pa. St. 375; 93 Am. Dec. 714.

¹ *Duffield v. Cross*, 12 Ill. 377; *Hollingsworth v. Swedenborg*, 49 Ind. 378; 19 Am. Rep. 687; *Monaghan v. School Dist.*, 38 Wis. 100.

² *Godfrey v. Hays*, 6 Ala. 501; 41 Am. Dec. 58. A father, although insolvent, may, in a *bona fide* contract,

promise his minor child a reasonable part of the prospective crop as compensation for the child's labor, and such part will not be liable for the father's debts: *Wilson v. McMillan*, 62 Ga. 16; 35 Am. Rep. 115.

³ *Halliday v. Miller*, 29 W. Va. 424.

⁴ *Gifford v. Kollock*, 3 Ware, 45.

⁵ *Grand Rapids etc. R. R. Co. v. Showers*, 71 Ind. 451.

⁶ *Emery v. Kempton*, 2 Gray, 257.

⁷ *Whitehead v. R. R. Co.*, 22 Mo. App. 60. The mother of a minor child, after remarrying, is not entitled to recover for the services of such child in the absence of an agreement to pay her therefor: *Hollingsworth v. Swedenborg*, 49 Ind. 378; 19 Am. Rep. 687.

⁸ *Ballard v. St. Albans Adv. Co.*, 52 Vt. 325.

⁹ *Coffin v. Shaw*, 3 Ware, 82.

circumstances, to show that the son had embezzled money from the business amounting to more than the unpaid wages. A father has not an unqualified right to his son's wages superior to all offsets and equities between the son and the employer.¹ A father cannot bind his infant son as apprentice without the son's consent; therefore, one to whom a father has bound his son as apprentice without the son's consent has no action against another for enticing such apprentice from his service.² A plaintiff in an action for services done by his minor son is not required to prove the legitimacy of his son.³

But the parent has no rights in the general property of the child which comes to it by gift, inheritance, bequest, or the like.⁴ A father has no authority to receive a legacy left his child; and an executor paying the father from the funds of the estate the amount of the legacy left his infant son is liable to an account to the estate for such sum.⁵ This rule has been applied to a bounty from the United States, because such bounty is a gift, rather than a compensation.⁶ A father cannot convey an easement in land, of which the record title is in his minor son, though he has exercised acts of general ownership over the land.⁷ Parents may waive their rights to the services of their minor children.⁸ But a waiver does not necessarily amount to emancipation;⁹ for the child may still live with and be provided for by its parents. Until the right is given in full, the custody of the child may belong to its parents;

¹ Schoenberg v. Voigt, 36 Mich. 310.

² Pierce v. Massenburg, 4 Leigh, 493; 26 Am. Dec. 333.

³ Haight v. Wright, 20 How. Pr. 91.

⁴ Kenningham v. McLaughlin, 3 B. Mon. 30; Miles v. Kaigler, 10 Yerg. 10; 30 Am. Dec. 425; Keeler v. Fassett, 21 Vt. 539; 62 Am. Dec. 71; Linton v. Walker, 8 Fla. 144; 71 Am. Dec. 105.

⁵ Johnson's Adm'r v. Johnson, 2 Hill Ch. 277; 29 Am. Dec. 73.

⁶ Magee v. Magee, 65 Ill. 255.

⁷ Farmer v. McDonald, 59 Ga. 509.

⁸ Cloud v. Hamilton, 11 Humph. 104; 53 Am. Dec. 778; Corey v. Corey, 19 Pick. 29; 31 Am. Dec. 117; Dierker v. Hess, 54 Mo. 246; Huntoon v. Hazelton, 20 N. H. 388; Farrell v. Farrell, 3 Houst. 633; Murrell v. Murrell, 2 Strob. Eq. 148; 49 Am. Dec. 664. After the emancipation of a minor by his parent, property purchased by the former with his own means is not subject to the parent's control or disposal: Francisco v. Benepe, 6 Mont. 243.

⁹ Jenness v. Emerson, 15 N. H. 488.

but consent of the latter may be presumed when the former offers its services to one for hire.¹ Where a minor contracts on his own account for his services, with his father's knowledge and consent, there is an implied assent that the son shall be entitled to his earnings.² When a child, after arrival at full age, continues to reside with and serve the parent, the presumption is that such services were gratuitous. But this presumption may be rebutted by proof.³ Minor children may assist, with the father's assent, in work on the wife's farm without giving the husband any title to the products, the children being entitled, by the terms of the deed, to their maintenance from it.⁴ A daughter may recover from her mother's administrator for personal services rendered the mother while insane. A contract to pay may be implied. Nor does it matter that, during her lifetime, the mother had a guardian to whom the daughter might have looked.⁵

ILLUSTRATIONS.—A father consented in good faith that his minor daughter should receive to her own use sums which she might thereafter earn by serving. *Held*, that money thus earned by the daughter while continuing to receive her support from her father, and to act as his housekeeper, was not subject to the payment of the father's existing debts: *Johnson v. Silsbee*, 49 N. H. 543. An indenture of apprenticeship was inoperative as such by reason of informality. *Held*, admissible to show an agreement that the master was to render a specific compensation to the child for its services, and consequently that the parent relinquished all right to compensation therefor: *Kerwin v. Wright*, 59 Ind. 369. The defendant enticed away the minor son of the plaintiff against his father's consent, and placed him in the United States army as a substitute. *Held*, that he was liable to the plaintiff for the value of the son's services during the whole period of his absence as a soldier: *Bundy v. Dodson*, 28 Ind. 295. The plaintiff's minor son agreed with the defendant to work for him for the season, at certain monthly wages to be paid to the minor. The plaintiff, who

¹ *Corey v. Corey*, 19 Pick. 29; 31 Am. Dec. 117; *Whiting v. Earle*, 3 Pick. 201; 15 Am. Dec. 207.

⁴ *Rush v. Vought*, 55 Pa. St. 437; 93 Am. Dec. 769.

² *Burdsall v. Waggoner*, 4 Col. 261. ⁵ *Reando v. Misplay*, 90 Mo. 251; 59 Am. Rep. 13.

³ *Young v. Herman*, 97 N. C. 280.

lived near by, knew of the agreement, and that his son was working for the defendant, but made no objection, and gave the defendant no notice that he should demand his wages. After the work had been done and the defendant had paid the son, the plaintiff demanded his wages. *Held*, that he was estopped from claiming them: *Smith v. Smith*, 30 Conn. 111. A parent was present and assenting when his minor daughter entered into a contract, in writing, with a school board, as teacher, which was signed by her in her own name and not by him. In the absence of other proof of any intention on his part to relinquish his rights to her wages, *held*, that he may maintain an action against the board for such unpaid wages: *Monaghan v. School Dist. No. 1*, 38 Wis. 100. A, his minor son, and B agreed that the son should work for B until his majority, the wages to be paid to the son. *Held*, that A could maintain an action against B for a breach of the agreement, and could recover the expense of obtaining other employment for the son: *Dickinson v. Talmage*, 138 Mass. 249. A natural son and his father dealt at arm's-length as strangers, and the son rendered valuable services to his father. *Held*, that compensation was due, although there was no express contract: *Broderick v. Broderick*, 28 W. Va. 378. A girl lived with her grandfather as a member of his family, and did house-work for him. He declared several times that he intended to give her a part of his property as he would his children, and that she should be paid for her services. *Held*, not evidence of a promise to pay: *Dodson v. McAdams*, 96 N. C. 149; 60 Am. Rep. 408.

§ 819. Right of Parent to Recover for Injuries to Child.—A child, as much as an adult, has a right of action against a person who wrongs or injures him.¹ But the parent has also a right of action against the defendant for his loss of his child's services consequent on the injury, and for the expense which he has been put to for care, medicines, or other things, as the case may be.² In England, where the child is too young to have earned anything for the parent, the latter has no right of action for anything.³ But the better rule, in the United States, seems

¹ *Wilton v. R. R. Co.*, 125 Mass. 130; *Rogers v. Smith*, 17 Ind. 323; 79 Am. Dec. 483.

² *Schouler on Domestic Relations*, 258; *Kennard v. Burton*, 25 Me. 39; 43 Am. Dec. 249; *Karr v. Parks*, 44 Cal. 46; *Shields v. Yonge*, 15 Ga. 349; 60

Am. Dec. 698; *Wilton v. R. R. Co.*, 125 Mass. 130; *Klingman v. Holmes*, 54 Mo. 304; *Houston etc. R. R. Co. v. Miller*, 49 Tex. 322; *Whitney v. Hitchcock*, 4 Denio, 461; *Rogers v. Smith*, 17 Ind. 323; 79 Am. Dec. 483.

³ *Hall v. Hollander*, 7 Dowl. & R. 133.

to be, that, even where the child was not capable, by reason of its age, of performing any service for the parent, he may, nevertheless, recover for his trouble and expense in his care or cure of the child.¹ One who hires a minor and puts him to dangerous work whereby he is injured is liable to his father. It is no defense that the father permitted the boy to receive his own wages.² At common law, the mother of a son not emancipated, fatally injured by the negligence of a railroad company, may recover for the loss of services from the time of the injury to the time of the death, and for incidental expenses incurred for medical attendance, nursing, etc.³ A father may maintain an action against one who employs his child without the father's consent, and through whose negligence the child is killed.⁴ A father who sues a railroad company for an injury sustained by his son, who was put to a dangerous employment, must show that the company knew that the son was a minor.⁵ In an action by a mother for damages for the loss of the services of an infant child, plaintiff must allege and prove that, at the date of the accident, the child was in her service.⁶

A widowed mother, entitled to the services of her minor son, living with and supported by her at the time of his injury, by reason of a defect in a public road, caused by negligence of the county commissioners, may recover for the care and labor of nursing him, and for the cost of medicine and medical attendance procured for her; she, however, is not entitled to damages for his or her own pain, suffering, or anxiety.⁷ Where there is no testamentary guardian, the mother is entitled to recover for

¹ *Dennis v. Clark*, 2 Cush. 347; 48 Am. Dec. 671; *Karr v. Parks*, 44 Cal. 46; *Sykes v. Lawler*, 49 Cal. 236; *Durden v. Barnett*, 7 Ala. 169.

² *Soldanels v. R. R. Co.*, 23 Mo. App. 516.

³ *Natchez etc. R. R. Co. v. Cook*, 63 Miss. 38.

⁴ *Fort Wayne etc. R. R. Co. v. Beyerle*, 110 Ind. 100.

⁵ *Gulf etc. R. R. Co. v. Redeker*, 67 Tex. 190; 60 Am. Rep. 20.

⁶ *Matthews v. R. R. Co.*, 26 Mo. App. 75.

⁷ *Commissioners v. Hamilton*, 60 Md. 340; 45 Am. Rep. 739.

the destruction of clothing furnished by her to an infant daughter living with and supported by her.¹ It is no bar to a suit brought in the name of an infant by his next friend, for injuries sustained from the careless running of the defendant's train, that the father of the infant had also brought suit for the same injuries.² The fact that a child, by her father as next friend, has recovered damages against a corporation for a personal injury does not bar a subsequent action by him for the loss of her services occasioned by the same injury. It was so held where a girl nearly thirteen years old had recovered from a horse-car company five thousand dollars for an injury to her arm, and on her arriving of age, her father also recovered from the company fifteen hundred dollars for such loss.³ One who, in violation of the law, sells a revolver to a boy of fifteen is not answerable to the boy's parents for loss of services incurred by reason of the boy's carelessly shooting himself, there being nothing to charge the seller with knowledge of the likelihood of such an accident.⁴ A parent may maintain an action against one who entices away or abducts a minor child.⁵ Where a third person procures, or is instrumental in procuring, the marriage of an infant child, neither the parents, nor any one standing *in loco parentis*, can recover against such third person therefor.⁶ A parent cannot maintain an action against the teacher of a public school for refusing to instruct his child as a pupil.⁷ No action lies in favor of a father upon the official bond of a clerk for damages by reason of the

¹ *Burke v. R. R. Co.*, 7 Heisk. 451.

² *Central R. R. Co. v. Brinson*, 64 Ga. 475.

³ *Wilton v. R. R. Co.*, 125 Mass. 130.

⁴ *Poland v. Earhart*, 70 Iowa, 285.

⁵ *Jones v. Tevis*, 4 Litt. 25; 14 Am. Dec. 98; *Vaughan v. Rhodes*, 2 McCord, 227; 13 Am. Dec. 713; *Kirkpatrick v. Lockhart*, 2 Brev. 276; *Sargent v. Mathewson*, 38 N. H. 54; *Steel v. Thatcher*, 1 Wall. 91; *Plum-*

mer v. Webb, 4 Mason, 380; *Cutting v. Seabury, Sprague*, 522; *Wodell v. Coggeshall*, 2 Met. 89; *Caughy v. Smith*, 47 N. Y. 244; *Schouler on Domestic Relations*, 354; 3 Bla. Com. 140; *Magee v. Holland*, 27 N. J. L. 86; 72 Am. Dec. 341. As to seduction, see *post*, Book III.

⁶ *Jones v. Tevis*, 4 Litt. 25; 14 Am. Dec. 98.

⁷ *Spear v. Cummings*, 23 Pick. 224; 34 Am. Dec. 53.

marriage of his minor daughter under a license unlawfully issued by the clerk without his consent.¹

ILLUSTRATIONS. — A received a child into his family, treated him as his own, and received his services, though he never legally adopted him. *Held*, that A could recover of B for medical attendance and loss of service to the time of the child's death, caused by the bite of B's dog: *Whitaker v. Warren*, 60 N. H. 20; 49 Am. Rep. 302. The agent of a children's aid society, being deceived by the false representations of a boy eighteen years of age, who gave a false name, and pretended that he was an orphan, etc., sent the boy to a home in the West. *Held*, that an action by the boy's parent to compel his return and for damages could not be sustained. The fact that the defendant had neglected to make inquiries as to the truth of the boy's story was not material in such an action, as the inquiries would have been fruitless; and the enticement to travel and find new homes, which is held out by a children's aid society, being necessary to the conduct of the society, and sanctioned by the statute incorporating it, is not an unlawful enticement or solicitation: *Nash v. Douglass*, 12 Abb. Pr., N. S., 187. In an action by parents to recover damages for the death of their son through the alleged negligence of a railroad company, it appeared that the son was twenty-eight years of age when the accident happened. He had been away from home at intervals after he attained his majority, and been in business on his own account. He had returned, however, to his father's house, and was engaged in his father's business, for which no compensation was paid him. It appeared that he intended to remain with his father, and that his services were valuable to him in his business. *Held*, that it was for the jury to decide whether there was a reasonable expectation of pecuniary advantage accruing to plaintiffs which was destroyed by the loss of the son: *North. Penn. R. R. Co. v. Kirk*; 90 Pa. St. 15.

§ 820. Liability of Parent on Infant's Contracts — Necessaries Supplied to Child. — A parent is not liable upon the contracts of his minor children, unless he has either expressly or impliedly authorized them to be made.²

¹ *Holland v. Beard*, 59 Miss. 161; 42 Am. Rep. 360.

² *Raymond v. Loyl*, 10 Barb. 483; *Weeks v. Merrow*, 40 Me. 151; *Kelley v. Davis*, 49 N. H. 176; 6 Am. Rep. 499; *Owen v. White*, 5 Stew. & P. 435; 30 Am. Dec. 572; *Angel v. McLellan*, 16 Mass. 28; 8 Am. Dec. 118; *Wil-*

son v. Wilson, 52 Iowa, 44; *Clark v. Gotta*, 1 Ill. App. 455; *Bailey v. King*, 41 Conn. 365; *Kernodle v. Caldwell*, 46 Ind. 153; *Rogers v. Turner*, 59 Mo. 116; *Harper v. Lemon*, 38 Ga. 227; *Clark v. Clark*, 48 Conn. 586; *Byers v. Thompson*, 66 Ill. 421; *Mortimer v. Wright*, 6 Mees. & W. 482; *Bainbridge*

It is a question for the jury to say whether or not the circumstances in any given case imply a promise from the parent to pay for articles purchased by the child.¹ Where a son had left home and had purchased articles for his own use, his father was held liable for the price, in an action to recover it, on the ground that he had paid the seller for articles purchased from him by the son previously, and that the agency continued until notice of its revocation.² Where a parent permits a stranger to maintain, support, and instruct his children, in no way objecting to the act, but rather assenting and advising therein, the law will presume that he knows his obligations and assumes their payment.³ A father is liable for the board of his daughter over twenty-one years of age, if furnished at his request, though no promise to pay such board be made in writing.⁴ An infant having no guardian, and living with his mother, a widow, and going to a school in the neighborhood, will be presumed to be sent by her if the contrary is not shown.⁵ Where goods are sold to a minor on his credit, without the knowledge, order, or consent of his father, a subsequent promise by the latter to pay therefor is invalid for want of a legal consideration.⁶ A father is not bound by the contracts or debts of his minor children, even for necessities, unless an actual authority can be shown or a legal authority inferred. The latter can only arise where the father has absolutely neglected and refused to provide his children with necessities.⁷ Inadequate provision by a father for

v. Pickering, 2 W. Black. 1325; *Gordon v. Potter*, 17 Vt. 348; *Freeman v. Robinson*, 38 N. J. L. 383; 20 Am. Rep. 399; *Holt v. Baldwin*, 46 Mo. 265; 2 Am. Rep. 515; *White v. Mann*, 110 Ind. 74.

¹ *Kelley v. Davis*, 49 N. H. 176; 6 Am. Rep. 499; *Baker v. Baker*, 41 Vt. 55.

² *Murphy v. Ottenheimer*, 84 Ill. 39; 25 Am. Rep. 424.

³ *McGoon v. Irvin*, 1 Pinn. 526; 44 Am. Dec. 409.

⁴ *Kernodle v. Caldwell*, 46 Ind. 153.

⁵ *Tilton v. Russell*, 11 Ala. 497.

⁶ *Freeman v. Robinson*, 38 N. J. L. 383; 20 Am. Rep. 399.

⁷ *Van Valkinburgh v. Watson*, 13 Johns. 480; 7 Am. Dec. 395; *Owen v. White*, 5 Port. 435; 30 Am. Dec. 572. In *Angel v. McLellan*, 16 Mass. 28, 8 Am. Dec. 118, the court say: "The father is obliged to support his children while they remain part of his family. Perhaps, if he fail to furnish them with clothing and food necessary to the

a child's necessities is not sufficient of itself to warrant the implication of a promise by the father to pay others for supplying the deficiency, particularly where the child is living at home.¹ If a wife leaves her husband without justifiable cause, taking their minor child with her, and the husband is able and willing to support the child, and so informs the wife and a third person with whom she places the child, the fact that the father makes no attempt to obtain the custody of the child does not of itself authorize the wife to pledge his credit for necessities furnished to the child by such third person at the request of the wife.² A father is not liable for necessities furnished to his adult daughter at her request, although she is a member of his family and he made no objection to their being furnished.³ A person who voluntarily supports an orphan under no contract with the deceased parent cannot recover from the latter's executor.⁴ One cannot recover, as for necessities, for medical services to a minor whom the parent has not refused to supply with proper medical attention, unless such services were rendered with the parent's knowledge and consent.⁵

ILLUSTRATIONS. — An action was brought to recover the price of cloth and trimmings sold to D's minor son. D told his son in the spring that he could work out, and D would get him some clothes in the autumn. D did not refuse to get the clothes, but neglected to get them; and he knew of the purchase. He also gave his son one dollar and part of his son's earnings to pay for

support of life, any one who furnishes such necessities may maintain an action against the father, upon the presumption of an assent on his part. Perhaps, also, if he cruelly and causelessly turn them out of doors, they would carry with them a credit on the father for the means of support, although it may be questioned whether in such a case the support of such children should not be provided for pursuant to the statute requiring the kindred of poor persons within certain degrees to support them: *Stats.* 1793, c. 59, sec. 3. But upon these points the case before us does not require an opinion. However this may

be, we think it clear that when a child leaves his parents' house voluntarily, for the purpose of seeking his fortune in the world, or to avoid the discipline and the restraint so necessary for the due regulation of families, he carries with him no credit, and the parent is under no obligation to pay for his support."

¹ *Hunt v. Thompson*, 3 Scam. 179; 36 Am. Dec. 538.

² *Baldwin v. Foster*, 138 Mass. 449.

³ *Blachley v. Laba*, 63 Iowa, 22; 50 Am. Rep. 724.

⁴ *Burns v. Madigan*, 60 N. H. 197.

⁵ *Rogers v. Turner*, 59 Mo. 116.

making up the clothes. *Held*, that D was not liable: *Gordon v. Potter*, 17 Vt. 348. An action was brought for goods sold to D's minor son while he was employed by a third person. Some of the articles were, and some were not, necessities. D knew where his son was. *Held*, that he was not liable: *Kelley v. Davis*, 49 N. H. 187; 6 Am. Rep. 499. D's son worked for the plaintiff, who provided clothes for him when in a destitute condition. D did not give his consent to the arrangement. *Held*, that D was not liable: *Raymond v. Loyl*, 10 Barb. 483. D's son left home without the knowledge or consent of his father, who was sued for board furnished to the son. *Held*, that there was no contract to pay for it by the defendant: *Weeks v. Merrow*, 40 Me. 151. In A's action against B for necessities furnished to C, infant son of B, *held*, that the fact that receipts for payment by C were by A given to C in his own name, and that the bills for the balance presented to B were also made out by A to C, are, if not explained, conclusive that the credit was given to C, and not to B: *Bartels v. Moore*, 9 Daly, 235. An illegitimate child was supported by relatives of the mother, at the request of the father, and upon his promise that they should be paid, and that if the child survived him he would provide for her by will sufficiently to enable her to pay therefor. He died before the child, but made no such provision. After coming of age the child promised to repay the expenditures. *Held*, that an action lay against the father's estate to recover therefor, and that such action could be maintained by the child: *Todd v. Weber*, 95 N. Y. 181; 47 Am. Rep. 20. Where a minor son spends most of his time away from home, and is allowed to retain most of the wages which he receives for his labor, *held*, that a dealer who furnishes him clothing cannot recover its value from his father, if the latter has never authorized the son to buy on his credit or authorized or confirmed the transaction, and if there is no showing that the articles furnished were in any proper sense necessities, or that the father failed in his duty to supply the son's wants: *Tyler v. Arnold*, 47 Mich. 564. A parent knew that another was boarding his minor child, with expectation of reward. *Held*, to import a legal obligation of the parent to pay for the board: *Clark v. Clark*, 46 Conn. 586. Goods which were necessary to the comfort of a minor daughter of the defendant were sold to her whilst she was living away from home, and receiving her own wages, and charged to the father. *Held*, that the father was not liable: *Gotts v. Clark*, 78 Ill. 229. A father's payment of his son's bills to B. without objection, after publishing a notice forbidding all persons to trust the son on his account, *held*, to be a waiver of his rights under the notice, so far as B. was concerned: *Bailey v. King*, 41 Conn. 365.

§ 821. **Liability of Parent for Torts of Child.**—A parent is not liable for injuries to the persons or property of third persons committed by an infant child;¹ unless they are done under his direction, or by his command,² or by his permission.³ A father is not liable for the negligent and careless shooting of a horse by his minor son; nor will a subsequent promise to pay its value render him liable.⁴ A father who willfully, negligently, and carelessly suffers his son of eleven to have in his possession a loaded pistol cannot be made to respond in damages to one injured thereby.⁵ But a father who permits his children, on his premises, to fire pistols, and shout, to the fright of horses on the highway, is liable for an injury sustained by a passer-by whose horse took fright. His knowledge that they had previously done such acts may be shown.⁶

ILLUSTRATIONS.—A minor son contracted with his father to clear a parcel of land, and in doing so, negligently burned property of a third person. *Held*, that the father was liable: *Teagarden v. McLaughlin*, 86 Ind. 476; 44 Am. Rep. 332. A son was sent by his father for cattle in a certain pasture in which they were supposed to be, and not finding them there, searched for them in the vicinity, and selected them from other cattle in a neighboring pasture. *Held*, that the father was liable for the trespass: *Andrus v. Howard*, 36 Vt. 248; 84 Am. Dec. 680. A minor son was in the habit of driving his father's team to convey the family to church, with the acquiescence of the father and of an older daughter, who, in the father's absence, was in charge of the family, business, and property. *Held*, sufficient to charge the father with liability for the son's negligence in driving the team on another occasion: *Schaefer v. Osterbrink*, 67 Wis. 495; 58 Am. Rep. 875.

¹ *Baker v. Haldeman*, 24 Mo. 219; *Levan*, 39 Pa. St. 177; *Schlossberg v. Denio*, 175; *Tift v. Tift*, 4

Denio, 175; *Moon v. Towers*, 8 Com. B., N. S., 611; *McCauley v. Wood*, 2 N. J. L. 86; *Edwards v. Krunie*, 13 Kan. 348; *Wilson v. Garrard*, 59 Ill. 51; *Paulin v. Howser*, 63 Ill. 312; *Chandler v. Denton*, 37 Tex. 416; *Paul v. Hummel*, 43 Mo. 121; 97 Am. Dec. 381; *Scott v. Watson*, 46 Me. 362; 74 Am. Dec. 457; *Hagerty v. Powers*, 66 Cal. 368; 56 Am. Rep. 101; *Strohl v.*

Levan, 39 Pa. St. 177; *Schlossberg v. Denio*, 175; *Tift v. Tift*, 4

² *Carmouche v. Bouis*, 6 La. Ann. 95; 54 Am. Dec. 558.

³ *Hoverson v. Noker*, 60 Wis. 511; 50 Am. Rep. 381.

⁴ *Baker v. Morris*, 33 Kan. 590.

⁵ *Hagerty v. Powers*, 66 Cal. 368; 56 Am. Rep. 101.

⁶ *Hoverson v. Noker*, 60 Wis. 511; 50 Am. Rep. 381.

§ 822. **Duty of Child to Support Parents.**— There is no legal duty resting upon an adult child to support a poor or an aged parent unable to support himself;¹ or a grandparent.² But by statute in Connecticut, Maine, Pennsylvania, Vermont, Massachusetts, New York, and Iowa, this duty is thrown upon children and others of the family, if able.³

§ 823. **Right of Child to Wages—Right of Parent to Charge Board.**— Where a child, after coming of age, remains in his father's house and performs labor for the parent, the presumption is that there is no agreement for wages on the one hand, or for the price of board and lodging on the other.⁴ In fact, the rule is, that, as between members of the same family, services rendered are deemed gratuitous, and the law will not imply a promise to pay for them;⁵ and the same is true as to obligations for board.⁶ The law will not imply an agreement on the part of a parent to pay for the ordinary services as housekeeper of his daughter who is living in his family.⁷ If a mother has maintained her own children, the presumption is that she did it gratuitously, and, in the absence of any express or implied promise to pay her for maintaining them, she is not entitled to be reimbursed therefor.⁸ A child may recover against a father upon an express agreement to pay wages during minority. But the burden is upon the child of proving the agreement by clear evidence.⁹ A son may recover from his father's estate an

¹ *Cook v. Bradley*, 7 Conn. 57; 18 Am. Dec. 79; *Edwards v. Davis*, 16 Johns. 281; *Stone v. Stone*, 32 Conn. 142; *Becker v. Gibson*, 70 Ind. 239; *Lebanon v. Griffin*, 45 N. H. 558; *Gray v. Spalding*, 58 N. H. 345.

² *Wethersfield v. Montague*, 3 Conn. 507.

³ See note to *Colebrook v. Stewartstown*, 64 Am. Dec. 279.

⁴ *Schouler on Domestic Relations*, 270; *Poorman v. Kilgore*, 26 Pa. St. 365; 67 Am. Dec. 425; *Prickett v. Prick-*

ett, 20 N. J. Eq. 478; *Smith v. Smith*, 30 N. J. Eq. 564; *Arnold v. Franklin*, 3 Ill. App. 141; *Allen v. Allen*, 60 Mich. 635.

⁵ *Williams v. Hutchinson*, 3 N. Y. 312; 53 Am. Dec. 301; see *ante*, Title I., Master and Servant.

⁶ *Miller's Appeal*, 100 Pa. St. 568; 45 Am. Rep. 394.

⁷ *Barrett v. Barrett*, 5 Or. 411.

⁸ *Seitz's Appeal*, 87 Pa. St. 159.

⁹ *Titman v. Titman*, 64 Pa. St. 480.

amount equal to the value of personal services rendered in the lifetime of his parent as overseer upon his plantation, where it appears that there was an understanding that the services were not to be gratuitous, and there was no provision made for the son in his father's will.¹ No express contract need be proved to enable a son to recover from his father's estate for a house built by the son on his father's land in the lifetime of the latter.² But if a son would charge the estate of his deceased father for the support of the father, an express contract must appear.³

ILLUSTRATIONS. — A son resided with his aged parents, his father being infirm and of weak mind, and ran the farm only so as to secure a living for all three. *Held*, that the presumption was that the son's services were rendered gratuitously: *Wilson v. Wilson*, 52 Iowa, 44. In 1871, A married a widow having a son ten years old, who, in 1874, was reasonably well educated. They all lived on land owned by the mother as dower, with fee in her son, the present worth of whose interest — all the property he had — was \$977.55. On the death of the son, in 1878, A brought a claim against his estate for \$799.83 for maintenance and education between 1874 and 1878. *Held*, that the estate was not liable, as the claim was not for necessities: *Gayle v. Hayes*, 79 Va. 542. The plaintiff received into his family the infant granddaughter of his wife when very young, and he supported her for several years under the agreement that she should live with him until of age. The grandmother having died, the father of the infant removed the infant from the plaintiff's family against his will. *Held*, that plaintiff could not maintain an action for the support of the child: *Thorp v. Bateman*, 37 Mich. 68; 26 Am. Rep. 497. An infant, whilst out of a place, was permitted to reside with his uncle, and during such time was provided with food and clothing, and worked in the same way as the children of the family. *Held*, that the law did not imply a contract to pay for such services of the infant: *Defrance v. Austin*, 9 Pa. St. 309.

§ 824. **Power of Infant to Hold Public Office.** — An infant cannot ordinarily hold a public office.⁴ He cannot be an executor, or a trustee, or a guardian, or a

¹ Price v. Price, Cheves Eq. 167; 34 Am. Dec. 608.

² Byers v. Thompson, 66 Ill. 421.

³ Pritchard v. Pritchard, 69 Wis. 373.

⁴ Schouler on Domestic Relations, 394; People v. Dean, 3 Wend. 433.

bailiff, or a receiver;¹ nor can he hold a judicial office.² An infant administrator, in the absence of fraud or tort, is not liable in *devastavit* for failure to appropriate assets ratably.³ An officer selling property is not bound to accept the bid of an infant at a public auction.⁴ A verdict will not be set aside because one of the jurors was an infant, where his name was on the list of jurors returned and impaneled, though the losing party did not know of the infancy until after verdict.⁵ An infant cannot appoint an agent or attorney.⁶ He therefore cannot affirm what another has assumed to do in his name as an agent or attorney; he cannot affirm what he cannot authorize;⁷ and being incapable of appointing an attorney, the latter's dismissal of a suit by the infant would be void.⁸

§ 825. To Make a Will.—An infant cannot make a valid will.⁹ In some states, an infant may, by statute, make a valid will of personalty at eighteen.¹⁰

§ 826. To be a Witness.—A person is not disqualified from being a witness in a judicial tribunal simply because he is not of age, nor even for the reason that he is of very tender age. The rule is now pretty well settled that if the child appears to have sufficient intelligence to distinguish between good and evil, and to comprehend the nature and effect of an oath, he is an admissible witness.¹¹

¹ Schouler on Domestic Relations, 394; Bailey v. Miller, 5 Ired. 444; 44 Am. Dec. 47.

² Golding's Petition, 57 N. H. 146; 24 Am. Rep. 66.

³ Saum v. Coffelt, 79 Va. 510.

⁴ Kinney v. Showdy, 1 Hill, 544.

⁵ Wassum v. Feeney, 121 Mass. 93; 23 Am. Rep. 258.

⁶ Trueblood v. Trueblood, 8 Ind. 195; 65 Am. Dec. 756; Mustard v. Wohlford, 15 Gratt. 329; 76 Am. Dec. 209; Philpot v. Bingham, 55 Ala. 435. An infant distributee cannot appoint an agent or attorney to receive and receipt for his distributive share in an

intestate's estate: Tapley v. McGee, 6 Ind. 56.

⁷ Armitage v. Widoe, 36 Mich. 124.

⁸ Wainwright v. Wilkinson, 62 Md. 146.

⁹ Schouler on Domestic Relations, 397.

¹⁰ Schouler on Domestic Relations, 397 n.

¹¹ Greenl. Ev., sec. 367; Commonwealth v. Lynes, 142 Mass. 577; 56 Am. Rep. 709; State v. Belton, 24 S. C. 185; 58 Am. Rep. 245; Holst v. State, 23 Tex. App. 1; 59 Am. Rep. 770; Taylor v. State, 22 Tex. App. 529; 58 Am. Rep. 656.

§ 827. Right of Children to Use Property of Parent.—

It has been held that members of a family have an implied authority to use in a careful and proper manner such property of the parent as is usually applicable to family purposes.¹ But this principle is strictly limited; therefore it has been ruled that a son has no more right than a stranger to lend his father's goods.²

ILLUSTRATIONS.—A minor son, for purposes of his own, in the absence of his father, and without his knowledge, took his father's horse and carriage, and left the horse unfastened in the street, and the horse, being frightened, ran away, and the carriage collided with the plaintiff's, and injured the same. *Held*, that the father was not liable: *Maddox v. Brown*, 71 Me. 432; 36 Am. Rep. 336.

§ 828. Liabilities of Infants—Contracts of Infants Voidable.—Contracts made by persons under age are voidable at their election.³ In early times it was held that all contracts, grants, or deeds made by an infant of his land were void. But in England, since the case of *Zouch v. Parsons*,⁴ if the nature of the instrument actually delivered by the infant be such as to pass an interest in property, it is voidable only; and accordingly deeds, mortgages, etc., without any special circumstances to render them void, seem now universally conceded to be voidable only. This is the rule now well established in the United States.⁵ An infant may avoid his bond for

¹ *Bennett v. Gillette*, 3 Minn. 423; 74 Am. Dec. 774. "Can there be any doubt," it is said in this case, "that the child may use the books in the father's library, hunt with his gun and dogs, sail in his yacht, and even invite a friend to participate with him in these pursuits or amusements?"

² *Johnson v. Stone*, 40 N. H. 197; 77 Am. Dec. 706.

³ *Fetrow v. Wiseman*, 40 Ind. 148; *Cole v. Pennoyer*, 14 Ill. 158; *Cheshire v. Barrett*, 4 McCord, 241; 17 Am. Dec. 735; *Roof v. Stafford*, 7 Cow. 180; *Scott v. Buchanan*, 11 Humph. 471; *Barker v. Wilson*, 4 Heisk. 269; *Whitney v. Dutch*, 14

Mass. 462; 7 Am. Dec. 229; *Ferguson v. Bell*, 17 Mo. 351; *Weaver v. Jones*, 24 Ala. 424; *Shropshire v. Burns*, 46 Ala. 108; *Mustard v. Wohlford*, 15 Gratt. 337; 76 Am. Dec. 209; *Vaughan v. Parr*, 20 Ark. 608; *Chapin v. Shaffer*, 49 N. Y. 412; 1 Am. Lead. Cas., 4th ed., 244; *Breckenridge v. Ormsby*, 1 J. J. Marsh. 236; 19 Am. Dec. 71.

⁴ 3 Burr. 1794.

⁵ *Bool v. Mix*, 17 Wend. 119; 31 Am. Dec. 285; *Gillett v. Stanley*, 1 Hill, 125; *Van Nostrand v. Wright*, Hill & Den., Lalor's Sup., 260; *Eagle Fire Co. v. Lent*, 6 Paige, 635; *Wheaton v. East*, 5 Yerg. 41; 26 Am. Dec. 251; *Dominick v. Michael*, 4 Sand.

money loaned him by his father's administrator to enable him to acquire a professional education, and his mere acknowledgment of the debt after majority without an express promise to pay is not a ratification.¹ Infancy is an available defense in an action upon contract brought to enforce a joint liability against the infant as a secret partner.² Many cases held the contracts of an infant against his interest to be void.³ Under this head fall a contract of suretyship;⁴ a release given by an infant to her guardian on receiving his note for the money belonging to her in his hands;⁵ a compromise of an action for slander;⁶ a mortgage given by an infant wife to secure her husband's debt;⁷ a deed without consideration.⁸ Infancy is a good defense to an action for the breach of a promise to marry,⁹ notwithstanding the law allowing infants to marry upon assent of parents.¹⁰

374; *Roberts v. Wiggin*, 1 N. H. 73; 8 Am. Dec. 38; *State v. Plaisted*, 43 N. H. 413; *Kline v. Beebe*, 6 Conn. 494; *Johnson v. Rockwell*, 12 Ind. 76; *Doe v. Abernathy*, 7 Blackf. 442; *Pitcher v. Laycock*, 7 Ind. 398; *Babcock v. Doe*, 8 Ind. 110; *Philips v. Green*, 3 A. K. Marsh. 9; 5 T. B. Mon. 344; 13 Am. Dec. 124; *Hubbard v. Cummings*, 1 Me. 11; *Worcester v. Eaton*, 13 Mass. 371; 7 Am. Dec. 155; *Boston Bk. v. Chamberlin*, 15 Mass. 220; *Kendall v. Lawrence*, 22 Pick. 540; *Irvine v. Irvine*, 9 Wall. 617; *Barker v. Wilson*, 4 Heisk. 268; *Scott v. Buchanan*, 11 Humph. 468; *Stuart v. Baker*, 17 Tex. 417; *Schneider v. Staihr*, 20 Mo. 271; *Hastings v. Dollarhide*, 24 Cal. 195; *Slaughter v. Cunningham*, 24 Ala. 260; 60 Am. Dec. 463; *Manning v. Johnson*, 26 Ala. 446; 62 Am. Dec. 732; *Dixon v. Merritt*, 21 Minn. 196; *Illinois etc. R. R. Co. v. Bonner*, 75 Ill. 315. A mortgage made by an infant is not void, but voidable: *Roberts v. Wiggin*, 1 N. H. 73; 8 Am. Dec. 38; *State v. Plaisted*, 43 N. H. 413; *Palmer v. Miller*, 25 Barb. 399; *Adams v. Ross*, 30 N. J. L. 505; 82 Am. Dec. 237. The promissory note of an infant is voidable, not void: *Young v. Bell*, 1 Cranch C. C. 342; *Buzzell v. Bennett*, 2 Cal. 101; *Wright v. Steele*,

2 N. H. 51; *Reed v. Batchelder*, 1 Met. 559; *Everson v. Carpenter*, 17 Wend. 419; *Best v. Givens*, 3 B. Mon. 72; *Earle v. Reed*, 10 Met. 387; *Goodsell v. Myers*, 3 Wend. 479.

¹ *Turner v. Gaither*, 83 N. C. 357; 35 Am. Rep. 574. The phrase "capable of contracting," in the Kansas statute relating to the disaffirmance of contracts by infants, means "legally capable of contracting": *Burgett v. Barrick*, 25 Kan. 526.

² *Vinseu v. Lockard*, 7 Bush, 458.

³ *Lawson v. Lovejoy*, 8 Me. 405; 23 Am. Dec. 527; *Wheaton v. East*, 5 Yerg. 41; 26 Am. Dec. 251; *Green v. Wilding*, 59 Iowa, 679; 44 Am. Rep. 696; *Robinson v. Weeks*, 56 Me. 102.

⁴ *Maples v. Wightman*, 4 Conn. 376; 10 Am. Dec. 149; *contra*, *Fetron v. Wiseman*, 40 Ind. 148; *Williams v. Harrison*, 11 S. C. 412.

⁵ *Fridge v. State*, 3 Gill & J. 103; 20 Am. Dec. 463.

⁶ *Ware v. Cartledge*, 24 Ala. 622; 60 Am. Dec. 489.

⁷ *Chandler v. McKinney*, 6 Mich. 217; 74 Am. Dec. 686.

⁸ *Swafford v. Ferguson*, 3 Lea, 292; 31 Am. Rep. 639.

⁹ *Rush v. Wick*, 31 Ohio St. 521; 27 Am. Rep. 523.

¹⁰ *Rush v. Wick*, 31 Ohio St. 521; 27 Am. Rep. 523.

And, again, it has been said: "An infant may enter into a binding contract which is clearly for his benefit."¹ A contract by which an infant binds himself as an apprentice, being an act manifestly for his benefit, is binding in law, and therefore the party who is injured by the breach of such a contract may maintain an action therefor.² Infants may contract marriage settlements, and they will be bound thereby when of full age.³ An infant married to a man of full age is bound by a settlement made by him with her guardian by her consent and direction.⁴ A minor over eighteen years of age may make a valid contract of enlistment into the army of the United States without the consent of his parents or guardian.⁵ An infant's contract to serve a railroad company as employee is valid as between himself and the company; and want of the previous consent of the parent does not avoid it. It remains good until either the parent or his minor child puts an end to it.⁶ That an employee of a railroad company is a minor does not exempt him from the rule as to assumption of the dangers incident to the business.⁷ An infant on coming of age cannot recover money which, by his directions, had been used by his brother for the support of his parents.⁸ If an infant receives rents, he cannot demand them again when of age.⁹ An infant is bound by his partition if he might be compelled to make it by law.¹⁰ The doctrine that an infant will be held bound

¹ *Williams v. Hutchinson*, 3 N. Y. 312; 53 Am. Dec. 301; citing 2 Kent's Com. 236; *United States v. Bainbridge*, 1 Mason, 82; *Keane v. Boycott*, 2 H. Black. 511; *Maddon v. White*, 2 Term Rep. 161.

² *Woodruff v. Logan*, 6 Ark. 276; 42 Am. Dec. 695. An infant, though under seven years, may bind himself as apprentice, with the assent of his parent, guardian, or next friend: *Brotzman v. Bunnell*, 5 Whart. 123; 34 Am. Dec. 537. But the contract of apprenticeship made by the infant alone is voidable at his election: *Clark*

v. Goddard, 39 Ala. 164; 84 Am. Dec. 777.

³ *Tabb v. Archer*, 3 Hen. & M. 399; 3 Am. Dec. 657.

⁴ *Haines v. State*, 60 Ind. 41.

⁵ *In re Higgins*, 16 Wis. 351; *Grace v. Wilber*, 10 Johns. 453.

⁶ *Nashville etc. R. R. Co. v. Elliott*, 1 Cold. 611; 78 Am. Dec. 507.

⁷ *De Graff v. R. R. Co.*, 76 N. Y. 125.

⁸ *Welch v. Welch*, 103 Mass. 562.

⁹ *Parker v. Elder*, 11 Humph. 546.

¹⁰ *Bavington v. Clarke*, 2 Pen. & W. O. (Pa.) 115.

by an act which the law would have compelled him to perform does not apply in the case of a voluntary distribution; for the law, though it would have coerced a distribution, might not have made just such a one as was made by the parties.¹ An infant heir is bound to assign dower, and may do it by guardian.² An infant may make a binding contract for the support of his bastard child.³

ILLUSTRATIONS.—A boy of seventeen bought a bicycle with the earnings of his labor. *Held*, that he could avoid the contract, return the bicycle, and recover the money back: *Pyne v. Wood*, 145 Mass. 558. An infant gave his note with a surety for the purchase-money of chattels; the vendor recovered judgment thereon, which the surety paid; the infant gave him his note therefor, secured by mortgage on the same chattels. *Held*, valid as against a purchaser of the chattels from the infant, with knowledge of the mortgage: *Knaggs v. Green*, 48 Wis. 601; 33 Am. Rep. 838. An infant was fined for a misdemeanor. A became his surety for the amount, paid it, took judgment against the infant, and made his guardian a garnishee. *Held*, that infancy was no defense, and that the process of garnishment could be maintained: *Dial v. Wood*, 9 Baxt. 296. Plaintiff's infant son bought of the defendant cigar-holders and tobacco-pipes, and paid for them. Afterward, plaintiff's wife, the mother of the child, went with the boy to defendant, tendered back the articles, and demanded the money paid for them, which was refused. *Held*, that plaintiff could recover the money, and that demand by plaintiff's wife was sufficient: *Sequin v. Peterson*, 45 Vt. 255; 12 Am. Rep. 194. On the acknowledgment of a deed by several grantors, one of whom was an infant, the infant refused to state to the officer that he was of age, but one of the other grantors so stated. *Held*, that the infant was not bound by the deed: *Vogelsang v. Null*, 67 Tex. 465. An infant mortgages to his father land conveyed by the father without consideration, and the father assigns the mortgage as collateral to a creditor. *Held*, that the son cannot set up his infancy to defeat the mortgage: *Bridges v. Bidwell*, 20 Neb. 185. An infant, without knowing the consequences of her act, wrote her name, at her guardian's request, on the back of a certificate of stock, and the guardian pledged the stock as collateral for his own debt. *Held*, that the infant was not bound: *Smith v. Baker*, 42 Hun, 504.

¹ *Kilcrease v. Shelby*, 23 Miss. . . 161.

² *Jones v. Brewer* 10 Pick. 314.

³ *Stowers v. Hollis*, 83 Ky. 544.

§ 829. **Except for Necessaries — What are Necessaries.**— The contract of an infant for necessities supplied to him is, however, valid and binding upon him.¹ And a married infant may bind himself for necessities for his wife and children.² “Necessaries” are not simply such things as are absolutely necessary for the existence and support of the infant, but include all such articles as are requisite to maintain him in his station of life.³ While infants are liable for necessities purchased by them when not supplied by the parent or guardian, they are not bound by an agreement to pay a particular sum. Whether the articles purchased were necessities, and whether the sum agreed to be paid was a fair price, are questions to be determined by the court.⁴ Board, lodging, clothing, food, medicine, and education are clearly necessities.⁵ But an oversupply of goods, otherwise necessary, ceases to be a supply of necessities as to the excess.⁶ An infant who buys goods not necessities, on credit, and does not return them, is liable for so much of the price as is equal to the benefit derived by him from the purchase.⁷

But other things also fall within the definition. Accordingly, the following have been held to be necessities: An attorney's services in defending him in a bastardy proceeding,⁸ or counsel fees in recovering his estate,⁹ or

¹ Reeve on Domestic Relations, 227; *Kline v. L'Amoureux*, 2 Paige, 419; 22 Am. Dec. 652.

² *Chaffee v. Cooper*, 13 Mees. & W. 259; *Beeler v. Young*, 1 Bibb, 520.

³ *Leake on Contracts*, 549; *Breed v. Judd*, 1 Gray, 458; *Story on Sales*, 34, 35.

⁴ *Parsons v. Keys*, 43 Tex. 557. In *McKanna v. Merry*, 61 Ill. 179, the rule is stated to be, that “the articles furnished or money advanced must be actually necessary, in the particular case, for use, not mere ornament; for substantial good, not mere pleasure; and must belong to the class which the law generally pronounces necessary for infants.”

⁵ *Watson v. Cross*, 2 Duvall, 147; *Hyman v. Cain*, 3 Jones L. 111; *Bradley v. Pratt*, 23 Vt. 378; *Glover v. Ott*, 1 McCord, 572; *Peters v. Fleming*, 6 Mees. & W. 48; *Stone v. Dennison*, 13 Pick. 6; 23 Am. Dec. 654; *Squier v. Hydliff*, 9 Mich. 274; *Wilhelm v. Hardman*, 13 Md. 144.

⁶ *Johnson v. Lines*, 6 Watts & S. 80; 40 Am. Dec. 543.

⁷ *Hall v. Butterfield*, 59 N. H. 354; 47 Am. Rep. 209; *Bartlett v. Bailey*, 59 N. H. 408.

⁸ *Barker v. Hibbard*, 54 N. H. 539; 20 Am. Rep. 160.

⁹ *Epperson v. Nugent*, 57 Miss. 45; 34 Am. Rep. 434.

prosecuting an action for breach of promise of marriage;¹ horses,² livery for a servant,³ watches,⁴ wedding clothes,⁵ or a bridal outfit.⁶ And the following have been held to be not necessities: Articles merely for adornment;⁷ cigars and tobacco;⁸ a college education;⁹ an insurance policy;¹⁰ jewelry;¹¹ repairs to the infant's dwelling-house;¹² rent of a building for carrying on a trade or manual occupation;¹³ goods to carry on his trade with;¹⁴ lumber to build a house;¹⁵ the board of horses, the principal use of which was in the infant's business of hackman, though occasionally used to carry his family out to ride;¹⁶ though where horseback exercise is prescribed by a physician, it is a necessary;¹⁷ nor is a farrier's bill for work looking after the infant's horses;¹⁸ nor are saddles, bridles, whips, liquors, fiddles, fiddle-strings, powder and pistols, etc.;¹⁹ nor is money lent to the minor a necessary;²⁰ even though raised by mortgage to pay off a prior mortgage on property inherited by the infant;²¹ nor though paid at the request of the infant to relieve him from a draft for military duty;²² though if lent to procure a release

¹ *Munson v. Washband*, 31 Conn. 303; 83 Am. Dec. 151.

² In England: *Hart v. Prater*, 1 Jur. 623. *Contra*, in this country: *Rainwater v. Durham*, 2 Nott & McC. 524; 10 Am. Dec. 637; *Grace v. Hale*, 2 Humph. 27; 36 Am. Dec. 296.

³ *Hands v. Slaney*, 8 Term R. 578.

⁴ *Peters v. Fleming*, 6 Mees. & W. 42.

⁵ *Sams v. Stockton*, 14 B. Mon. 187.

⁶ *Jordan v. Coffield*, 70 N. C. 110.

⁷ *Lefils v. Sugg*, 15 Ark. 137.

⁸ *Bryant v. Richardson*, L. R. 3 Ex. 93, note.

⁹ *Middlebury College v. Chandler*, 16 Vt. 683; 42 Am. Dec. 537.

¹⁰ *New Hampshire Ins. Co. v. Noyes*, 32 N. H. 345.

¹¹ *Ryder v. Wombwell*, L. R. 3 Ex. 90.

¹² *Tupper v. Cadwell*, 12 Met. 559; 46 Am. Dec. 704.

¹³ *Lowe v. Griffith*, 1 Scott, 458; 1 Hodges, 30.

¹⁴ *Mason v. Wright*, 13 Met. 306;

Stone v. Withipool, Latch, 21; *Whittingham v. Hill*, Cro. Jac. 494; *Whyhall v. Champion*, 2 Stra. 1083; *Turberville v. Whitehouse*, 1 Car. & P. 94; *Decell v. Lewenthal*, 57 Miss. 331; 34 Am. Dec. 449.

¹⁵ *Freeman v. Bridger*, 4 Jones, 1; 67 Am. Dec. 258.

¹⁶ *Merriam v. Cunningham*, 11 Cush. 40.

¹⁷ *Hart v. Prater*, 1 Jur. 623.

¹⁸ *Clowes v. Brooke*, 2 Strange, 1100; *Andrew*, 277.

¹⁹ *Beeler v. Young*, 1 Bibb, 519; *Glover v. Ott*, 1 McCord, 572; *McKanna v. Merry*, 61 Ill. 179.

²⁰ *Earle v. Peale*, 1 Salk. 387; *Beeler v. Young*, 1 Bibb, 519; *Smith v. Gibson Peake* Ad. Cas. 52; *Darby v. Boucher*, 1 Salk. 279; *Probart v. Knouth*, 2 Esp. 472, note; *McKanna v. Merry*, 61 Ill. 177.

²¹ *Magee v. Welsh*, 18 Cal. 155; *West v. Gregg*, 1 Grant Cas. 53, 114; *Bicknell v. Bicknell*, 111 Mass. 265.

²² *Dorrell v. Hastings*, 28 Ind. 478.

from arrest for necessities, or if the infant is charged in execution, it is held to be recoverable; but to entitle the plaintiff so to recover, he must show that the money was advanced under such circumstances.¹ So an infant is liable for money paid at his request to satisfy a debt which he had contracted for necessities.² And though money lent to purchase necessities is, in general, not recoverable, yet if in fact laid out by the lender for the necessities the infant is liable.³ It will not be presumed that kid gloves, cologne, fiddle-strings, bridles and spurs, walking-canes, powder-flasks and caps, a silk cravat, and a silk and linen coat, which constitute the bulk of a bill, are such articles as will bind a parent upon any implied or express contract to pay for necessities furnished to his minor children.⁴

If the wants of the infant be supplied by his parent, guardian, or by any other person, he cannot render himself liable for articles which would otherwise be necessities.⁵ Where the minor resides with his parents, the presumption is that he is supplied by them.⁶

ILLUSTRATIONS. — A minor fifteen years of age, and the owner of a considerable estate, employed a dentist to fill his teeth, which were decayed and gave him pain, the work being neces-

¹ *Clark v. Leslie*, 5 Esp. 28.

² *Randall v. Sweet*, 1 Denio, 460.

³ *Earle v. Peale*, 1 Salk. 387; *Smith v. Oliphant*, 2 Sand. 306; *Swift v. Bennett*, 10 Cush. 436; *Randall v. Sweet*, 1 Denio, 460; *Probart v. Knouth*, 2 Esp. 472, note; *Bradley v. Piatt*, 23 Vt. 386; *Darby v. Boucher*, 1 Salk. 279; *Ellis v. Ellis*, 1 Ld. Raym. 344.

⁴ *Lefils v. Sugg*, 15 Ark. 137.

⁵ *Gay v. Ballou*, 4 Wend. 403; 21 Am. Dec. 158; *Rivers v. Gregg*, 5 5 Rich. Eq. 274; *Kraker v. Byron*, 13 Rich. 163; *Kline v. L'Amoureux*, 2 Paige, 419; 22 Am. Dec. 652; *Wailing v. Toll*, 9 Johns. 141; *Guthrie v. Murphy*, 4 Watts, 80; 28 Am. Dec. 681; *Angel v. McLellan*, 16 Mass. 31; 8 Am. Dec. 118; *Pool v. Pratt*, 1 Chip. 253; *Beeler v. Young*, 1 Bibb, 521; *Hull v. Connolly*, 3 McCord, 6; 15 Am.

Dec. 612; *Cook v. Deaton*, 3 Car. & P. 114; *McKanna v. Merry*, 61 Ill. 180; *Nicholson v. Wilborn*, 13 Ga. 475; *Perrin v. Wilson*, 10 Mo. 451; *Elrod v. Myers*, 2 Head, 33; *Davis v. Caldwell*, 12 Cuah. 513. Neither a minor nor his estate in the hands of his guardian is liable for the price of necessities furnished the minor, his guardian having fully supplied him with necessities: *Nichol v. Steger*, 6 Lea, 393.

⁶ *Jones v. Colvin*, 1 McMull. 14; *Perrin v. Wilson*, 10 Mo. 451; *Hull v. Connolly*, 3 McCord, 6; 15 Am. Dec. 612; *Freeman v. Bridger*, 4 Jones, 1; 67 Am. Dec. 258. A minor child will not be liable for necessities furnished him merely because his father is poor and unable himself to pay for them: *Hoyt v. Casey*, 114 Mass. 397; 19 Am. Rep. 371.

sary to their preservation. *Held*, to be within the class of necessities: *Strong v. Foote*, 42 Conn. 203. Five of six heirs, tenants in common, the sixth being a minor, contracted with an attorney to give him an undivided half of their ancestor's estate for services in breaking a will. *Held*, that neither the minor nor his estate can be compelled to contribute: *Dillon v. Bowles*, 8 Mo. App. 419. Two minors died intestate and unmarried, their father being their heir at law, but imbecile and possessed of no estate. Their sister nursed them through their last illness, and prepared the bodies for interment. *Held*, that her claim being for necessities, and the parent unable to pay, the estate of the minors was liable: *Werner's Appeal*, 91 Pa. St. 222.

§ 830. Securities Given for Necessaries.—An infant cannot be charged on a bill of exchange or promissory note, although given in payment for necessities;¹ nor can an infant bind himself by an account stated in respect of a debt due for necessities;² nor by executing a warrant of attorney or *cognovit*,³ or a bond with a penalty;⁴ nor charge himself with the payment of interest;⁵ nor charge his estate by a mortgage deed⁶ for a debt due for necessities. An infant is not liable at law on his note or other contract, whereby he obtains money to build a barn or work his farm, although the money be expended for necessities. The indebtedness for necessities for which he is liable must be created directly therefor.⁷ A surety on an infant's note given for necessities, having been compelled to pay it, cannot maintain an action against the infant for reimbursement during his infancy.⁸

§ 831. Other Party to Contract with Infant Bound.—The other party to a contract made with an infant is

¹ *Williamson v. Watts*, 1 Camp. 552; *Morton v. Steward*, 5 Ill. App. 533.

² *Trueman v. Hurst*, 1 Term Rep. 40.

³ *Oliver v. Woodroffe*, 4 Mees. & W. 650.

⁴ Co. Lit. 172 a; *Fisher v. Mowbray*, 8 East, 330; *Baylis v. Dineley*, 3 Maule & S. 477.

⁵ *Fisher v. Mowbray*, 8 East, 330.

⁶ *Martin v. Gale*, L. R. 4 Ch. Div. 428; L. J. 46 Ch. Div. 84.

⁷ *Price v. Sanders*, 60 Ind. 410. A trust deed by an infant is not void, nor is it voidable to the extent that it is for necessities: *Cooper v. State*, 37 Ark. 421.

⁸ *Ayers v. Burns*, 87 Ind. 245; 44 Am. Rep. 759.

bound, though he is not.¹ The disaffirmance of an infant's contract is a personal privilege which can only be exercised by the infant himself or his heirs.² Thus an infant may sue on a breach of promise of marriage made to her by an adult, though if sued on such a promise infancy would be a good defense.³ An insurance company which has insured the property of infants cannot repudiate its liability on the ground that the infants are not bound.⁴ A contract of bailment made by the bailee with the agent of an undisclosed principal who is a minor cannot be rescinded by the bailee on the ground of the bailor's minority, without delivering the goods to him, even if the contract is voidable; and it is immaterial that the bailee would not have made the contract if he had known that the bailor was a minor.⁵

§ 832. **Disaffirmance by Infant.**—When the infant elects to disaffirm his voidable contract, he must disaffirm *in toto*, as well that portion which is to his advantage as that which is onerous to him.⁶ If an agreement be made

¹ Leake on Contracts, 552; Hunt v. Peake, 5 Cow. 475; 15 Am. Dec. 475; Warwick v. Cooper, 5 Sneed, 659; Oliver v. Houdlet, 13 Mass. 237; 7 Am. Dec. 134; Taylor v. Dansby, 42 Mich. 82; Cannon v. Alsbury, 1 A. K. Marsh. 76; 10 Am. Dec. 709; Hull v. Connolly, 3 McCord, 6; 15 Am. Dec. 612; Arnous v. Lesassier, 10 La. 592; 29 Am. Dec. 470; Holmes v. Rice, 45 Mich. 142.

² Kendell v. Lawrence, 22 Pick. 543; Beeler v. Bullitt, 3 A. K. Marsh. 280; 13 Am. Dec. 161; Bozeman v. Browning, 31 Ark. 364. The maker of a note cannot defend an action brought by an indorsee, upon the ground that the payee was an infant. The disability of an infant to make a valid, binding contract is a personal privilege intended for the benefit of the infant himself, and none but he or his representatives can take advantage of such disability: Garner v. Cook, 30 Ind. 331. In a suit to foreclose a mortgage given to secure a promissory note, the maker of the note may set

up by way of defense the fact that he was a minor when he executed the same, but a subsequent lien-holder cannot join in this defense. Only the minor himself can plead it: Baldwin v. Rosier, 1 McCrary, 384.

³ Willard v. Stone, 7 Cow. 22; 17 Am. Dec. 496.

⁴ Monaghan v. Agricultural Ins. Co., 53 Mich. 238.

⁵ Stiff v. Keith, 143 Mass. 224.

⁶ Heath v. West, 28 N. H. 108; Roberts v. Wiggin, 1 N. H. 73; 8 Am. Dec. 38; Bigelow v. Kinney, 3 Vt. 353; 21 Am. Dec. 589; Richardson v. Boright, 9 Vt. 372; Weed v. Beebe, 21 Vt. 495; Hubbard v. Cummings, 1 Me. 11; Cogley v. Cushman, 16 Minn. 402; Lowry v. Drake, 1 Dana, 46; Young v. McKee, 13 Mich. 556; Skinner v. Maxwell, 66 N. C. 45. A deed and mortgage constitute one contract in such a case, and one cannot be avoided without avoiding the other: Lynde v. Budd, 2 Paige, 191; 21 Am. Dec. 84.

by adults on one side and infants on the other, the latter, on coming of age, will be compelled to make an election, either to confirm the agreement as a whole, or to relinquish all rights and pretensions resulting from it.¹ Contracts for the sale of real estate cannot be disaffirmed by the infant till he arrives at his majority, while contracts as to personalty may be disaffirmed by him before that time, or within a reasonable time thereafter.² An infant who has executed a deed has seven years after coming of age in which to disaffirm it.³ A minor may disaffirm a contract made by him at any time thereafter during his minority, or within a reasonable time thereafter. The Iowa code is not intended to prevent a disaffirmance during minority, but only to fix a limit to the time when it may be made.⁴ The fact that the mother of a minor heir to real estate to whom the fee belongs is in possession thereof under right of dower affords no excuse for a failure on the part of such heir to disaffirm within a reasonable time after coming of age a deed made thereof.⁵ A minor, having in his possession the consideration received by him on the sale and delivery of his personal property, may return the same and rescind the contract during his minority as well as after he comes of age, and upon refusal, may maintain trover for the property by his next friend.⁶ The deed of an infant may be avoided at any time after becoming of age, until he is barred by the statute of limitations, provided there has been no word or act on his part indicating assent.⁷ An infant can redeem his land from tax sale (during his minority and for two years thereafter), even though it has been conveyed by the purchaser.⁸ A married wo-

¹ *Overbach v. Heermance*, 1 *Hopk. Ch.* 337; 14 *Am. Dec.* 546.

² *Stafford v. Roof*, 9 *Cow.* 626; *Shipman v. Horton*, 17 *Conn.* 481; *Bool v. Mix*, 17 *Wend.* 120; 31 *Am. Dec.* 285.

³ *Kountz v. Davis*, 34 *Ark.* 590.

⁴ *Childs v. Dobbins*, 55 *Iowa*, 205.

⁵ *Long v. Williams*, 74 *Ind.* 115.

⁶ *Towle v. Dresser*, 73 *Me.* 252. Trover or replevin may be maintained for goods purchased by an infant, if he, on coming of age, repudiates the contract of purchase: *Kitchen v. Lee*, 11 *Paige*, 107; 42 *Am. Dec.* 101.

⁷ *Wells v. Seixas*, 24 *Fed. Rep.* 82.

⁸ *Carroll v. Johnson*, 41 *Ark.* 59.

man is not estopped from disaffirming, at any time during coverture, a deed made by her during infancy by the fact that the grantee believed her an adult and has conveyed to an innocent third person, and that she and her husband have enjoyed the consideration since her majority.¹ A minor remainderman will not be excused from disaffirming his deed within a reasonable time after attaining majority merely because his right to bring ejectment for the land has not accrued. A reasonable time will not exceed seven years after the disability is removed. Ignorance of what he had done is no protection against prescription.²

An infant who has given his note in exchange for a horse may rescind the contract while under age by making tender of the horse and demanding the note.³ Subsequent conveyance of the same land to another person made by an infant after he attains his majority is a disaffirmance of his deed executed during infancy.⁴ A married woman may disaffirm a deed of her land executed during minority, with her husband, by a conveyance of the same land to another executed by herself and husband after she has attained her majority.⁵ If after coming of age an infant quitclaims land conveyed by him during his minority by warranty deed to another, he effectually disaffirms such conveyance.⁶ The bringing of an action is a disaffirmance by the infant of his release.⁷ A warranty deed by a minor will not disaffirm his prior mortgage deed, nor will a quitclaim after he attains majority.⁸ Where he seeks to recover the consideration moving from the other party, he must restore the consideration which he has received, if it is in his posses-

¹ *Buchanan v. Hubbard*, 96 Ind. 1.

² *Nathans v. Arkwright*, 66 Ga. 179.

³ *Hoyt v. Wilkinson*, 57 Vt. 404.

⁴ *Cresinger v. Welch*, 15 Ohio, 156; 45 Am. Dec. 565.

⁵ *Norcum v. Sheahan*, 21 Mo. 25; 64 Am. Dec. 214.

⁶ *Bagley v. Fletcher*, 44 Ark. 153.

⁷ *St. Louis etc. R. R. Co. v. Higgins*, 44 Ark. 293.

⁸ *Singer Mfg. Co. v. Lamb*, 81 Mo. 221.

sion or control; if he has spent, consumed, or injured it, he is not called on to return it.¹

But in an action prosecuted in behalf of an infant to recover for a fraud practiced on him, it is not a defense that he has not rescinded the contract or returned the property received.² The rule that when the consideration of the infant's contract has been lost during minority he does not lose his right to avoid it without restoration does not apply to a settlement made by an infant partner in a firm; the firm cannot maintain an action on the claim without first offering to restore what he received.³ Where an infant makes a contract to serve another, and afterwards avoids it, he may recover what his services are reasonably worth, taking into account any injury the other party sustains by the avoiding of the contract, and if such injury be equal to the value of the services rendered, he can recover nothing.⁴ An infant cannot make an election, and cannot create an estoppel against himself; but a court of equity has undoubted power to elect for him, and will not allow him to receive and hold the proceeds of an unauthorized sale of his prop-

¹ Carr v. Clough, 26 N. H. 280; 59 Am. Dec. 345; Robinson v. Weeks, 56 Me. 102; Price v. Furman, 27 Vt. 268; 65 Am. Dec. 194; Riley v. Mallory, 33 Conn. 201; Mustard v. Wohlford, 15 Gratt. 329; 76 Am. Dec. 209; Walsh v. Young, 110 Mass. 399; Bartlett v. Drake, 100 Mass. 176; Gibson v. Soper, 6 Gray, 282; Chandler v. Simmons, 97 Mass. 514; 93 Am. Dec. 117; Manning v. Johnson, 26 Ala. 446; 62 Am. Dec. 732; Carpenter v. Carpenter, 45 Ind. 142; Fitts v. Hall, 9 N. H. 441; Boody v. McKenney, 23 Me. 517; Enreka Co. v. Edwards, 71 Ala. 248; 46 Am. Rep. 314; Miller v. Smith, 26 Minn. 248; 37 Am. Rep. 407; Green v. Green, 7 Hun, 492; Dill v. Brown, 54 Ind. 204; Green v. Green, 69 N. Y. 553; 25 Am. Rep. 233; St. Louis etc. R. R. Co. v. Higgins, 44 Ark. 293. Other cases lay down the doctrine that he must return the consideration without any qualification as

to its being within his power or possession: Bartlett v. Cowles, 15 Gray, 445; Holmes v. Blogg, 8 Taunt. 508; Womack v. Womack, 8 Tex. 417; 58 Am. Dec. 119; Cummings v. Powell, 8 Tex. 93; Kilgore v. Jordan, 17 Tex. 355; Stuart v. Baker, 17 Tex. 421; Kerr v. Bell, 44 Mo. 125; Highley v. Barron, 49 Mo. 107; Baker v. Kennett, 54 Mo. 88; Taft v. Pike, 14 Vt. 409; 39 Am. Dec. 228; Farr v. Sumner, 12 Vt. 32; 36 Am. Dec. 327; Bingham v. Barley, 55 Tex. 281; 40 Am. Rep. 801; Bartholomew v. Finnemore, 17 Barb. 428; Bailey v. Barnberger, 11 B. Mon. 113; Gray v. Lessington, 2 Bosw. 257; Bryant v. Pottinger, 6 Bush, 473.

² Shuford v. Alexander, 74 Ga. 293.

³ Brown v. Hartford Fire Ins. Co., 117 Mass. 479.

⁴ Thomas v. Dike, 11 Vt. 273; 34 Am. Dec. 690.

erty, and at the same time repudiate the sale; equitable estoppels of this character apply as well to infants as to adults.¹ An infant may disaffirm a contract of assignment of a note without tendering back the consideration received for the assignment.² If an infant becomes a partner, puts money into the business, and does work for the partnership, he cannot afterwards, by rescinding the contract, recover of his partner the money so paid, or for the labor performed, in the absence of an express promise.³ A minor may recover money voluntarily paid by him on a contract which he has repudiated, and from which he derived no benefit, without deduction for damages for the rescission.⁴ Where a court of chancery has confirmed a lease of an infant's real estate, it cannot be impeached by the infant to the prejudice of *bona fide* purchasers for value of the leasehold interest.⁵ An infant cannot, on attaining majority, disaffirm an act which it would have been his duty, on arriving at full age, to do, and which by law he could have been compelled to do.⁶ Whenever an infant who has arrived at years of discretion, by direct participation, or by silence when he was called upon to speak, has entrapped a party ignorant of his title or of his minority into purchasing his property from another, he will be estopped in a court of chancery from setting up such title.⁷ The Iowa code, precluding a minor from disaffirming a contract where "the other party had good reason to believe the minor capable of contracting," is only available to a party who, when contracting, was ignorant of the minor's infancy.⁸

ILLUSTRATIONS. — A infant agreed to pay for a vehicle in installments. After making some payments, he demanded the money back, and offered to return the vehicle, and his demand

¹ Goodman v. Winter, 64 Ala. 410; 38 Am. Rep. 13.

⁵ Anderson v. Ammonett, 9 Lea, 1.

⁶ Elliott v. Horn, 10 Ala. 348; 44

² Briggs v. McCabe, 27 Ind. 327; 89 Am. Dec. 503.

Am. Dec. 488.

⁷ Ferguson v. Bobo, 54 Miss 121.

³ Page v. Morse, 128 Mass. 99.

⁸ Beller v. Marchant, 30 Iowa,

⁴ Shurtleff v. Millard, 12 R. I. 272; 350. 34 Am. Rep. 640.

being refused and his offer declined, he brought suit, pending which the vendor took the vehicle. *Held*, that the infant could recover, and that defendant could not recoup for the use of the vehicle while in the infant's possession: *McCarthy v. Henderson*, 138 Mass. 310. An infant was the sole owner of certain land. His guardian fraudulently contrived to get a decree of partition under which a sale was had, and the guardian squandered the proceeds. *Held*, that the infant was entitled to maintain proceedings to set aside the partition and to compel an account of rents and profits by the purchaser, without tendering or offering to restore the consideration paid by the purchaser. *Reynolds v. McCurry*, 100 Ill. 356. Land was conveyed in trust for the benefit of A, a minor, for her life. The deed contained a provision that if A at any time should desire to have the land sold, it should be sold upon her so requesting in writing. When ten years old, A requested that a sale be made. *Held*, that a sale made in compliance with the request could be repudiated by her upon attaining her majority: *Hill v. Clark*, 4 Lea, 405. An infant made a contract which conveyed to him land in fee in consideration of his notes payable at semi-annual intervals. *Held*, that the contract was voidable, but that on payment of three of such notes after coming of age, he could not subsequently disaffirm the contract, the value of the land having decreased after such last payment: *Hook v. Donaldson*, 9 Lea, 56. An infant married woman, seventeen years old, joined with her husband in conveying land in 1859, and nineteen months after her husband's death, in 1880, gave notice of her disaffirmance to the grantees of her husband's vendee, and four months later sued them for partition. *Held*, a valid disaffirmance, as made within the time after her husband's death that would bar her suit: *Richardson v. Pate*, 93 Ind. 423; 47 Am. Rep. 374. An infant *feme covert*, to whom lands in Indiana were conveyed, executed with her husband, May 20, 1847, a deed in fee therefor, for a valuable consideration paid by the grantee to him. She was, on her petition, divorced from him February 14, 1870. Within less than two months thereafter, she gave due notice of her disaffirmance of the deed, and demanded possession of the lands, which was refused. She thereupon brought suit. *Held*, that as she did nothing during her coverture to confirm the deed, her notice and suit avoided it: *Sims v. Everhardt*, 102 U. S. 300. A trustee under a deed of trust to secure a debt being about to sell land in default of payment, the defendant, A, a minor, agreed with the creditors that if B would buy a certain sum, or more, he (A) would give his note for the balance of the debt. B bought, for the sum named, the purchase-money being applied to the debt, and A gave his note. Afterwards, when A became of age, B conveyed to him. A did not pay

his note, and suit was brought to obtain a personal judgment against him, and to subject the land to the payment of the note. *Held*, that the action would not lie; the rule that an infant cannot avoid his contract while holding the fruit thereof did not apply, the note not having been given for the land: *Maupin v. Grady*, 71 Mo. 278. A female infant, nineteen years of age, knowing her rights, conveyed land to her father, for the purpose of enabling him to borrow money by giving a mortgage thereon to one who was ignorant of her minority. The father conveyed the land to pay the debt. The infant, arriving at full age, brought ejectment. *Held*, that a court of equity would restrain her from asserting her legal title and thus perpetrating a fraud: *Ferguson v. Bobo*, 54 Miss. 121. An adult hired a minor to work for him by the month, and the minor labored a given time and received of the adult certain articles of property on account of his labor. *Held*, that the minor could not retain the property so received, and recover the full value of his services: *Taft v. Pike*, 14 Vt. 405; 39 Am. Dec. 228. An infant exchanged horses, and without returning the horse procured in exchange brought an action for the value of the horse exchanged by him. *Held*, that the jury had no right to make an equitable adjustment between the infant and the defendant, but that the infant was entitled to the full value of his property: *Grace v. Hale*, 2 Humph. 27; 36 Am. Dec. 296. A father entered land in the name of his son for the purpose of defrauding his creditors, and afterward sold the land, and the son, by his direction, conveyed, during infancy, to the purchaser. On his coming of age, he conveyed the same land to another, who brought suit. *Held*, that as his conveyance during infancy was such as the law would have compelled him to make, he could not disaffirm it on attaining his majority: *Elliott v. Horn*, 10 Ala. 348; 44 Am. Dec. 488. A written notice of disaffirmance of a deed executed by a married woman jointly with her husband during her infancy, given by her three years and a half after her arrival at full age, *held*, a sufficient act of disaffirmance, and to have been done within a reasonable time: *Scranton v. Stewart*, 52 Ind. 69. A husband and wife conveyed real estate owned by the wife to their daughter, six years of age, and the deed was duly recorded. They afterward conveyed the same property in trust by a deed, to which the wife's name was signed at her request by the daughter, who was then about sixteen years of age, and who did not at the time remember the previous conveyance to herself. After the grantee in trust had made large advances in money and was proceeding to close up his trust, the fact of the conveyance to herself was recalled to the daughter's recollection. *Held*, that,

no intentional fraud on the part of the infant appearing, she was not estopped from claiming title under the deed to her: *Spencer v. Carr*, 45 N. Y. 406; 6 Am. Rep. 112. An infant who is also a married woman executes a deed voidable for both reasons eighteen months after her husband's death, and thirty-two years after attaining majority she disaffirms it. *Held*, a valid disaffirmance: *Wilson v. Branch*, 77 Va. 65; 46 Am. Rep. 79. A sewer was constructed through defendant's lot at the joint expense of himself and the owner of the upper lot, under a written agreement executed by defendant while an infant. *Held*, that his disaffirmance of the contract at majority revoked the easement created by the sewer: *McCarthy v. Nicrosi*, 72 Ala. 332; 47 Am. Rep. 418. A woman married in 1844 at the age of sixteen, joined with her husband in conveying her land a year afterward, he receiving the consideration. In 1881 she gave notice of her disaffirmance of the deed, her husband joining. *Held*, a valid disaffirmance: *Sims v. Bardoner*, 86 Ind. 87; 44 Am. Rep. 263. A woman executed a deed while an infant and married. Eighteen months after the death of her husband, and thirty-two years after attaining majority, she disaffirmed the deed. *Held*, a valid disaffirmance: *Wilson v. Branch*, 77 Va. 65; 46 Am. Rep. 709. A minor son conveyed real estate to his father, receiving and expending or wasting the consideration before majority; he had no other property. *Held*, that on arriving at full age he might disaffirm the deed without restoring the consideration, and that mere acquiescence for three years after majority is not a ratification: *Green v. Green*, 69 N. Y. 553; 25 Am. Rep. 233. An infant in consideration of an outfit to enable him to go to California agreed, with the assent of his father, to give the party furnishing the outfit one third of all the avails of his labor during his absence, which he afterward sent accordingly. The jury having found that the agreement was fairly made, and for a reasonable consideration, and beneficial to the infant, *held*, that he could not rescind the agreement and recover back the amount so sent, deducting the amount of the outfit and other money expended for him by the other party in pursuance of the agreement: *Breed v. Juud*, 1 Gray, 455. A contract made by a minor was disaffirmed by him six months after he attained his majority. *Held*, that such disaffirmance was not made within a reasonable time, no reason being shown why it was not sooner made: *Hoover v. Kinsey Plow Co.*, 55 Iowa, 668.

§ 833. **Ratification after Reaching Majority.**—An infant after reaching his majority may ratify his voidable

contract so as to bind himself.¹ By the English statute known as Lord Tenterden's act such a promise is not binding unless made in writing, and this requisite is essential by the statutes of Arkansas, Kentucky, Maine, Mississippi, New Jersey, Missouri, South Carolina, Virginia, and West Virginia.² In the absence of such a statute as that just mentioned, it is held that an express promise to pay is not required; any words are sufficient which import an express recognition and confirmation of the contract.³ But a mere acknowledgment of the debt is not sufficient. There must be a ratification of it.⁴ Nor are declarations of intention to carry out the contract made to third persons sufficient.⁵

The following acts have been held to amount to a ratification viz.: Retaining and using a horse purchased during infancy;⁶ retaining possession, after majority, of land leased or purchased;⁷ keeping a note—the consideration—eight months after coming to age, and not offering to return it until the maker has become insolvent;⁸ omitting to disaffirm within a reasonable time;⁹ promising the agent of the other party that he will pay the debt;¹⁰ allowing the grantee after his majority to put valuable improvements on the lands.¹¹ If an infant buys land and

¹ *Jackson v. Mayo*, 11 Mass. 147; 6 Am. Dec. 167. An infant's undertaking as surety for the stay of an execution is valid and enforceable, if ratified after his majority: *Harner v. Dipple*, 31 Ohio St. 72; 27 Am. Rep. 496.

² *Stimson's Statute Law*, 4147.

³ *Whitney v. Dutch*, 14 Mass. 457; 7 Am. Dec. 229.

⁴ *Thompson v. Lay*, 4 Pick. 48; 16 Am. Dec. 325; *Lawson v. Lovejoy*, 8 Me. 405; 23 Am. Dec. 526; *Tibbets v. Gerrish*, 25 N. H. 41; 57 Am. Dec. 307; *Edgerly v. Shaw*, 25 N. H. 514; 57 Am. Dec. 349.

⁵ *Hoit v. Underhill*, 9 N. H. 436; 32 Am. Dec. 380; *Bigelow v. Grannies*, 2 Hill, 120. But the ratification may be made to the undisclosed agent of the other party: *Hoit v. Underhill*, 10 N. H. 220; 34 Am. Dec. 148.

⁶ *Cheshire v. Barrett*, 4 McCord, 241; 17 Am. Dec. 735.

⁷ *Cheshire v. Barrett*, 4 McCord, 241; 17 Am. Dec. 735; *Baxter v. Bush*, 29 Vt. 465; 70 Am. Dec. 429. Or also selling it with a warranty: *Lynde v. Budd*, 2 Paige, 191; 21 Am. Dec. 85.

⁸ *Delano v. Blake*, 11 Wend. 85; 25 Am. Dec. 617.

⁹ *Little v. Duncan*, 9 Rich. 55; 64 Am. Dec. 760; *Keil v. Healey*, 84 Ill. 104; 25 Am. Rep. 434; *Blankenship v. Stont*, 25 Ill. 132; *Cole v. Pennoyer*, 14 Ill. 158; *Stucker v. Yoder*, 33 Iowa, 177.

¹⁰ *Mayer v. McLare*, 36 Miss. 389; 72 Am. Dec. 190.

¹¹ *Davis v. Dudley*, 70 Me. 236; 35 Am. Rep. 318.

mortgages it back for the purchase-money, and after coming of age, sells it, he ratifies the mortgage.¹ An unexplained delay of three years and a half after the ceasing of her disabilities is fatal to a disaffirmance of a deed made by a minor married woman.² If an infant continues under a contract of service after he becomes of age, without demanding increased wages, it is evidence of his affirmation of the contract.³ One's forgetfulness of having made a deed during his minority for twelve years after attaining majority furnishes no excuse for the delay in disaffirming it.⁴ The fact that a person making, after becoming of age, the promise to pay a debt contracted during infancy does not know he is not legally bound, does not defeat the effect of the new promise as a confirmation.⁵ By the Iowa code, a minor is bound by contracts for necessities and for all other contracts, unless he disaffirms them within a reasonable time after attaining majority. Disaffirmance before majority is of no effect. If a minor renders personal services under a contract and accepts payment for them according to the contract, he cannot maintain an action by his next friend upon the contract to recover again.⁶ Disaffirmance of an infant's deed thirteen years after he attains his majority is too late.⁷ On the issue of whether an infant's contract concerning his property has been ratified, it may be shown that the money was used for his advantage with his knowledge.⁸ A purchaser of land for a valuable consideration, with notice of a prior deed for the same land made by the grantor during infancy, but without notice of a subsequent ratification of that deed, will hold the land against the prior grantee.⁹

¹ *Uecker v. Koehn*, 21 Neb. 559; 59 Am. Rep. 849.

² *Goodnow v. Empire Lumber Co.*, 31 Minn. 468; 47 Am. Rep. 798.

³ *Spicer v. Earl*, 41 Mich. 191; 32 Am. Rep. 152.

⁴ *Tunison v. Chamblin*, 88 Ill. 378.

⁵ *Ring v. Jamison*, 2 Mo. App. 584.

⁶ *Murphy v. Johnson*, 45 Iowa, 57.

⁷ *O'Brien v. Gaslin*, 20 Neb. 347.

⁸ *Owens v. Phelps*, 95 N. C. 286.

⁹ *Black v. Hills*, 36 Ill. 376; 87 Am. Dec. 224.

The following have been held not to amount to ratification, viz.: The mere retention of the consideration of an executory contract;¹ offering to submit the question of his liability to arbitration;² acknowledging that he made a note, and that it is due;³ part payment.⁴ To make the contract of a minor binding upon him, he must have affirmed it after arriving of age, with full knowledge that it would be void without such confirmation.⁵ An offer by an adult debtor to compromise a claim, which by reason of his infancy when it arose could not be enforced, is not an equivalent to an acknowledgment of liability, and if it were, it would not be equivalent to a promise to pay the claim.⁶ The retention by a person after he has reached the age of twenty-one of the proceeds of lands which had been purchased and sold by him while an infant is not an act in affirmance of the contract, so far as to render him liable upon his covenant to pay a mortgage to which the lands were subject at the time of his purchase, and which by the deed he had agreed to pay as part of the consideration.⁷ Receipt of rents by one who has attained majority from property improved by work done or materials furnished during his minority does not amount to a ratification of his contract therefor, so as to operate as a lien against the property.⁸ A mortgage made during infancy may be affirmed by a conveyance after majority to a third person subject to the mortgage. But such a deed which does not refer to the mortgage is rather a disaffirmance.⁹ If the promise to pay a debt

¹ *Benham v. Bishop*, 9 Conn. 330; 23 Am. Dec. 359.

² *Benham v. Bishop*, 9 Conn. 330; 23 Am. Dec. 359.

³ *Benham v. Bishop*, 9 Conn. 330; 23 Am. Dec. 359.

⁴ *Catlin v. Haddox*, 49 Conn. 492; 44 Am. Rep. 249.

⁵ *Curtin v. Patten*, 11 Serg. & R. 305; *Hinely v. Margaritz*, 3 Pa. St. 428; *Ordinary v. Wherry*, 1 Bail. 28; *Norris v. Vance*, 3 Rich. 164.

Infant's accepting a lease does not estop him from denying his landlord's title when sued by the latter in ejectment: *McCoon v. Smith*, 3 Hill, 147; 38 Am. Dec. 623.

⁶ *Bennett v. Collins*, 52 Conn. 1.

⁷ *Walsh v. Powers*, 43 N. Y. 23; 3 Am. Rep. 654.

⁸ *McCarty v. Carter*, 49 Ill. 53; 95 Am. Dec. 572.

⁹ *Allen v. Poole*, 54 Miss. 323.

contracted in infancy is conditional,—as, to pay as soon as he could,—performance or the happening of the condition must be affirmatively shown to sustain an action.¹

ILLUSTRATIONS. — Minor heirs whose lands were sold on partition, after coming of age, with full knowledge of the facts, received their just proportion of the proceeds of the sale when collected. *Held*, that they were estopped from asserting title to the lands as sold, and from denying the validity of the sale upon any ground: *Walker v. Mulvean*, 76 Ill. 18. An infant took a deed of land and executed at the same time a mortgage thereof for part of the purchase-money. After coming of age he conveyed the land with warranty. *Held*, that this was an affirmation of the whole transaction, and that the mortgage was a legal charge upon the land in the hands of the purchasers: *Lynde v. Budd*, 2 Paige, 191; 21 Am. Dec. 84; *Hubbard v. Cummings*, 1 Me. 11; *Boston Bank v. Chamberlain*, 15 Mass. 220. A minor entered into a contract with his father respecting his share in the estate, which he failed to disaffirm within six months after he became of age. *Held*, not to be entitled to disaffirm it after that length of time had elapsed: *Jones v. Jones*, 46 Iowa, 466. An infant made a conveyance six months before coming of age which was not prejudicial to him, and knew that the grantee was making improvements on the land. *Held*, that he could not, after nine years had elapsed, claim the land: *Davis v. Dudley*, 70 Me. 236; 35 Am. Rep. 318. An infant purchased a horse, kept it until he arrived of age, and then converted it to his own use. *Held*, to amount to a ratification of the sale: *Robinson v. Haskins*, 14 Bush, 393. An infant was fraudulently induced to execute a deed of land to another, believing that she was simply executing an instrument authorizing the person named therein to sell the land, and failed to make inquiry respecting the exercise of the power for thirteen years after the attainment of her majority, when she was first informed of the fraud. *Held*, that she would not then be permitted to disaffirm her deed: *Weaver v. Carpenter*, 42 Iowa, 343. A deed by one of full age, *held*, to ratify a petition made in the grantor's minority under an award submitted by his guardian: *Johnston v. Furnier*, 69 Pa. St. 449. The lands of minors were sold under a decree for partition, and after coming of age they settled with their guardian, and received their share of the proceeds of the sale. *Held*, to bar them from prosecuting a writ of error to reverse the decree: *Corwin v. Shoup*, 76 Ill. 246. An infant took a conveyance of land on which there was a subsisting mortgage, which she assumed and agreed to pay. After she became

¹ *Everson v. Carpenter*, 17 Wend. 419.

of age, the mortgage was foreclosed, and she being made a party to the foreclosure suit, appeared by attorney, but put in no answer, and judgment was entered against her. *Held*, that having suffered the complaint in the foreclosure suit to be taken as confessed against her, she determined that the act done by her in infancy should stand: *Flynn v. Powers*, 54 Barb. 550; 36 How. Pr. 289. Upon a loan of money to an infant by a person ignorant of the infancy, the borrower executed a bond and mortgage therefor, and after he became of age he made a will directing the payment of "all his just debts," and died. *Held*, that the will was a confirmation of the mortgage: *Merchants' Fire Co. v. Grant*, 2 Edw. Ch. 544. An infant married woman conveyed land in 1875, and attained her majority in 1876. Her disability as a married woman ceased in 1880. In 1885 she brought suit to annul her conveyance, on the ground of fraud. From 1875 until the time of suit brought she had been in possession of land conveyed to her in exchange for that conveyed by her. *Held*, that she had confirmed her voidable act, and could not maintain her suit: *Ellis v. Alford*, 64 Miss. 8. A person in possession of land claiming title as to a moiety of the premises under a conveyance from an infant mortgaged the premises and afterwards sold expressly subject to the mortgage. The infant afterwards, upon becoming of age, executed a second deed to the grantee. *Held*, that, in the absence of proof to the contrary, the last deed must be deemed to have been in affirmance of the first, the whole land thereby remaining subject to the mortgage: *Eagle Fire Co. v. Lent*, 1 Edw. Ch. 301; 6 Paige, 635. A minor submitted a claim to arbitration, and the arbitrators awarded to him one thousand dollars, which sum was afterwards received by his guardian. The minor after arriving at full age received the amount from his guardian, and released him from all claims. *Held*, that this was an affirmance of the submission, and a bar to the claim submitted: *Jones v. Phoenix Bank*, 8 N. Y. 228. An infant ten days before his majority purchased a note, and drew an order on a third person in payment, of the non-payment of which order he had notice. In a suit against him on the order several years afterwards, *held*, that his failure to renew the note and disaffirm the contract after he became of age warranted the conclusion that he intended to abide by it, and countervailed the defense of infancy: *Thomasson v. Boyd*, 13 Ala. 419. One who had shipped when a minor, soon after becoming of age joined as co-libellant to recover his wages. *Held*, insufficient to show a ratification of the contract: *Burdett v. Williams*, 30 Fed. Rep. 697. An infant was a member of a firm which was dissolved seven weeks after he came of age, his partners agreeing with him to assume and pay all the debts of the firm. Among those

debts were certain checks made by the firm for goods before he came of age, protested for non-payment, but which until after dissolution he supposed had been paid. At the time of the dissolution some of the goods for which the checks had been given remained unsold, but he did not know it. He had drawn money from the firm after he came of age for his personal use. *Held*, that these facts did not constitute a ratification of his promise to pay the checks: *Tobey v. Wood*, 123 Mass. 88; 25 Am. Rep. 27. An infant contracted a debt which, after he had attained majority, he promised to pay "as fast as he got able." *Held*, that this promise availed nothing without proof of ability to pay: *Chandler v. Glover*, 32 Pa. St. 509. A defendant, in conversation concerning a note made by him during infancy, said he owed the plaintiff, but was unable to pay him, and that he would endeavor to procure his brother to be bound by him. *Held*, not to be a renewal of the promises: *Ford v. Phillips*, 1 Pick. 202. An infant gave his promissory note for a valuable consideration, but not for necessities, and paid a part before his coming of age. After coming of age he made a will, and therein directed his just debts to be paid. In a suit against the executors, *held*, that they were not liable to pay the balance due: *Smith v. Mayo*, 9 Mass. 62; 6 Am. Dec. 28. The purchaser of lands of an infant has not put valuable improvements thereon, nor been in actual possession thereof after the infant has attained his majority, for a period sufficiently long to bar a recovery of lands by reason of the statute of limitations. *Held*, that mere lapse of time will not amount to an affirmation of the sale by the infant, or bar him of his right to avoid it: *Gillespie v. Bailey*, 12 W. Va. 70; 29 Am. Rep. 445. The defendant, while an infant, purchased certain mortgaged real estate, and in the deed to her covenanted to pay the mortgage. She thereafter sold the real estate at an advanced price. Some years after she became of age, the mortgage was foreclosed by action in which she was made a party and appeared. A judgment thereon for deficiency was entered against her grantor. *Held*, that the covenant was voidable on the part of the defendant, and that a retention of the fruits of her sale after she became of age was not an act in affirmation of the contract, nor was the appearance in the foreclosure suit an act tending to ratify her obligation: *Walsh v. Powers*, 43 N. Y. 23; 3 Am. Rep. 654.

§ 834. Infant Liable for Torts.—Infancy is no defense to an action for a wrong independent of contract.¹

¹ *Bullock v. Babcock*, 3 Wend. 391; *Conklin v. Thompson*, 29 Barb. 218; *Oliver v. McClellan*, 21 Ala. 675; *Green v. Burke*, 23 Wend. 490; *Wal-*

Thus an infant is liable for an injury caused by his negligence,¹ for trespass,² for a nuisance,³ for an assault and battery,⁴ though unintentional.⁵ So an infant is liable to bastardy process.⁶ So ejectment lies against an infant.⁷ An infant is not liable for the malicious prosecution of a suit during his infancy in his name by his next friend, brought without his authority, although he assented thereto after he had knowledge of it.⁸ In Massachusetts, an infant is not liable to arrest on a civil process.⁹ If, however, the writ on its face was valid, the infant has no right of action against one aiding the officer in making the arrest; and it makes no difference that the infant proclaimed his infancy at the time.¹⁰ The infant is liable for a trespass committed by command of the father.¹¹ It is no defense to a suit against an infant for a tort that it was committed by the direction of one having authority over him.¹²

lace v. Morss, 5 Hill, 391; Studwell v. Shafter, 54 N. Y. 249; Baxter v. Bush, 29 Vt. 465; 70 Am. Dec. 429; Walker v. Davis, 1 Gray, 506; Lewis v. Littlefield, 15 Me. 233; Shaw v. Coffin, 58 Me. 254; 4 Am. Rep. 290; Elwell v. Martin, 32 Vt. 217; Ray v. Tubbs, 50 Vt. 688; 28 Am. Rep. 519; Vasse v. Smith, 6 Cranch, 231; Huchting v. Engel, 17 Wis. 237; 84 Am. Dec. 741; Robbins v. Mount, 33 How. Pr. 24; Eaton v. Hill, 50 N. H. 235; 9 Am. Rep. 189; Matthews v. Cowan, 59 Ill. 341; Peterson v. Haffner, 59 Ind. 130; 26 Am. Rep. 81; Conway v. Reed, 66 Mo. 346; 27 Am. Rep. 354. Even though the infant is under seven years of age: Huchting v. Engel, 17 Wis. 230; 84 Am. Dec. 741; Paul v. Hummel, 43 Mo. 119; 97 Am. Dec. 381.

¹ Peterson v. Haffner, 59 Ind. 130; 26 Am. Rep. 81; Conway v. Reed, 66 Mo. 346; 27 Am. Rep. 354; Bullock v. Babcock, 3 Wend. 391.

² Huchting v. Engel, 17 Wis. 231; 84 Am. Dec. 741; Sikes v. Johnson, 16 Mass. 389; Tift v. Tift, 4 Denio, 177; Campbell v. Stakes, 2 Wend.

137; 19 Am. Dec. 561; School Dist. v. Bragdon, 23 N. H. 557.

³ Addison on Torts, 731; Cooley on Torts, 106.

⁴ Peterson v. Haffner, 59 Ind. 130; 26 Am. Rep. 81; Paul v. Hummel, 43 Mo. 119; 97 Am. Dec. 381.

⁵ Conway v. Reed, 66 Mo. 346; 27 Am. Rep. 354.

⁶ Chandler v. Com., 4 Met. (Ky.) 66.

⁷ McCoon v. Smith, 3 Hill, 147; 38 Am. Dec. 623; Marshall v. Wing, 50 Me. 62.

⁸ Burnham v. Seaverns, 101 Mass. 360; 100 Am. Dec. 123. A person may be liable for prosecuting, after he is of full age, a vexatious suit, commenced by him while an infant: Sterling v. Adams, 3 Day, 411.

⁹ In re Cassier, 139 Mass. 458.

¹⁰ Cassier v. Fales, 139 Mass. 461.

¹¹ Humphrey v. Douglass, 10 Vt. 71; 33 Am. Dec. 177; Scott v. Watson, 46 Me. 362; 74 Am. Dec. 457; Huchting v. Engel, 17 Wis. 239; 84 Am. Dec. 741; School Dist. v. Bragdon, 23 N. H. 507.

¹² Smith v. Kron, 96 N. C. 392.

§ 835. **Violation of Contract Resulting in Tort.**—The breach of a contract cannot be complained of as a tort so as to hold the infant.¹ Therefore where a boy hired a horse, and injured it by immoderate driving, it was held that the boy could not be made liable in an action of tort.² The same rule was adhered to where an infant broke a borrowed carriage.³ But other cases have held infants liable where they have hired horses, and by their neglect have injured them.⁴ "The distinction to be relied on is this," says Mr. Schouler,⁵ "that when property is bailed to an infant, his infancy protects him so long as he keeps within the terms of the bailment; but when he goes beyond it, there is a conversion of the property, and he is liable just as though the original taking was tortious." So an infant has been held liable in an action of deceit upon the sale of a horse;⁶ in case for the embezzlement of goods intrusted to him;⁷ in *assumpsit* for money stolen or the proceeds of property stolen by him.⁸ It has been held in a number of cases that an infant is not liable to an action for fraudulently representing himself of full age, and thereby inducing the plaintiff to contract with him.⁹ Other cases, however, sustain the

¹ *Moore v. Eastman*, 1 Hun, 578; *Studwell v. Shafter*, 54 N. Y. 249; *Eaton v. Hill*, 50 N. H. 235; 9 Am. Rep. 189; *Gilson v. Spear*, 38 Vt. 311; 88 Am. Dec. 659; *Campbell v. Perkins*, 8 N. Y. 441.

² *Jennings v. Rundall*, 8 Term Rep. 335; *Eaton v. Hill*, 50 N. H. 239; 9 Am. Rep. 189.

³ *Schenck v. Strong*, 4 N. J. L. 87.

⁴ *Burnard v. Haggis*, 14 Com. B., N. S., 45; *Towne v. Wiley*, 23 Vt. 355; 56 Am. Dec. 85; *Homer v. Thwing*, 3 Pick. 492; *Campbell v. Stakes*, 2 Wend. 137; 19 Am. Dec. 561; *Ray v. Tubbs*, 50 Vt. 688; 27 Am. Rep. 519.

⁵ *Schouler on Domestic Relations*, 424. *Contra*, *Penrose v. Curren*, 3 Rawle, 351; 24 Am. Dec. 356.

⁶ *Word v. Vance*, 1 Nott & McC. 197; 9 Am. Dec. 683. *Contra*, the action

being trespass on the case, in *West v. Moore*, 14 Vt. 447; 39 Am. Dec. 235.

⁷ *Peigne v. Sutcliffe*, 4 McCord, 387; 17 Am. Dec. 756. But not in *assumpsit* for the money: *Penrose v. Curren*, 3 Rawle, 351; 24 Am. Dec. 356.

⁸ *Shaw v. Coffin*, 58 Me. 254; 4 Am. Rep. 290.

⁹ *Benjamin on Sales*, sec. 22, where this is said to be the English rule: *Curtin v. Patton*, 11 Serg. & R. 309; *Homer v. Thwing*, 3 Pick. 494; *Geer v. Honey*, 1 Root, 179; *Conrad v. Lane*, 26 Minn. 389; 37 Am. Rep. 412. A minor is not estopped to avoid his contract on the ground of infancy, by reason of false representations as to his age, made at the time of contracting: *Burley v. Russell*, 10 N. H. 184; 34 Am. Dec. 146.

action.¹ An infant wife is not bound by her release of dower, although she declared herself of age to the acknowledging officer, and may maintain a suit to avoid it, within a reasonable time after the death of her husband.² An infant is liable in an action *ex delicto* for an actual and willful fraud only in cases in which the form of action does not suppose that a contract has existed; and where the *gravamen* of the fraud consists in a transaction which really originated in contract, the plea of infancy is a good defense.³ An infant is liable in trover for a watch borrowed from the owner's wife, and not returned on demand, where no express or implied authority to lend it is shown, or even if such authority is shown if he uses it for a different purpose from that for which it was borrowed.⁴ An infant is liable upon his note given in settlement of a tort; as for having caused the death of the payee's horse by overdriving.⁵ A minor who has agreed to work for a manufacturing corporation at least six months, and not to leave without giving two weeks' notice, but who does leave without giving such notice, is not liable to have the damages occasioned thereby deducted from the amount he otherwise would be entitled to recover for his labor.⁶ Infancy of the lessee constitutes no defense to trover for crops converted, brought upon a provision in the lease reserving to the lessor a lien thereon for the rent.⁷

ILLUSTRATIONS. — A minor purchases goods to be paid for on delivery, and on the same being delivered, draws a check on a bank in which he has no funds, and which he has no reason to

¹ *Eckstein v. Frank*, 1 Daly, 334; *Fitts v. Hall*, 9 N. H. 441; *Kilgore v. Jordan*, 17 Tex. 341; *Schmitheimer v. Eiseman*, 7 Bush, 298; *Schuneman v. Paradise*, 46 How. Pr. 426; *Burley v. Russell*, 10 N. H. 184; 34 Am. Dec. 146; *Hughes v. Gallans*, 10 Phila. 618; *Rice v. Boyer*, 108 Ind. 472; 58 Am. Rep. 53.

² *Watson v. Billings*, 38 Ark. 278; 42 Am. Rep. 1.

³ *Gilson v. Spear*, 38 Vt. 311; 88 Am. Dec. 659.

⁴ *Green v. Sperry*, 16 Vt. 390; 42 Am. Dec. 519.

⁵ *Ray v. Tubbs*, 50 Vt. 688; 22 Am. Rep. 519.

⁶ *Derocher v. Continental Mills*, 58 Me. 217; 4 Am. Rep. 286.

⁷ *Baxter v. Bush*, 29 Vt. 465; 70 Am. Dec. 430.

think will honor the check. *Held*, that the delivery is procured by fraud, for which the minor is liable as in tort, and the mere fact that he made the contract, and by fraudulent means obtained possession of the property, will not shield him from liability to suit in case or in trover: *Matthews v. Cowan*, 59 Ill. 349. The defendant, when an infant, and owner of a lot adjoining the plaintiff's, agreed in writing that he might construct and use a sewer through his lot, and the sewer was built at the joint expense of himself and the plaintiff. The defendant afterward sold his lot, but the deed was not recorded, and the plaintiff did not know of it, and the defendant remained in occupation. Soon after attaining majority the defendant rescinded his agreement and stopped up the sewer. *Held*, that he was not liable in trespass: *McCarthy v. Nicrosi*, 72 Ala. 332; 47 Am. Rep. 418. Plaintiff, falsely representing himself to be of full age, bought a wagon, paying part, and giving his note, secured by a lien on the wagon, for the remainder. After using the wagon until the use was worth more than what he had paid, and until it had depreciated by more than a like sum, he made default in payment, whereupon defendant took the wagon under his lien, and sold it at auction. Plaintiff brought *assumpsit* for the money he had paid. *Held*, that he was entitled to recover: *Whitcomb v. Joslyn*, 51 Vt. 79; 31 Am. Rep. 678.

§ 836. **Advancements.**—Where a father, during his life, makes an advancement to any of his children towards their distributive share, in making the distribution of his property among the children at his death this must be reckoned.¹ But whether money or property given to one or more children during his life is a gift or an advancement, is always a question of intention, and if it was originally intended as a gift, it cannot afterwards be revoked and treated as an advancement.² A father advancing his child to whom he is in debt is presumed to do so with a view to the discharge of the debt, unless the circumstances prove a contrary intention.³ Advancement to a son in full of all claims against the estate of the father will not, after his death, prevent the son taking as heir a residuum not disposed of by will.⁴ A deed of lands

¹ Schouler on Domestic Relations, 272.

² *Kelly v. Kelly*, 6 Rand. 176; 18 Am. Dec. 710.

³ *Lawson's Appeal*, 23 Pa. St. 85; *Yundt's Appeal*, 13 Pa. St. 575; 53 Am. Dec. 496.

⁴ *Needles v. Needles*, 7 Ohio St. 432; 70 Am. Dec. 85.

by a father to his daughter's husband is not presumed an advancement to the daughter, and so of money paid by the father as surety for the husband.¹ The heir advanced may elect either to retain what he has received, or to relinquish it and claim his equal share with the others in the distribution of the estate.²

ILLUSTRATIONS. — A father purchased and paid for a policy of insurance on his own life in the name of his daughter and for her sole benefit, and paid the annual premiums until his death. *Held*, that the amount of the policy and of the annual premiums after its purchase were advancements: *Rickenbacker v. Zimmerman*, 10 S. C. 110; 30 Am. Rep. 37.

§ 837. **Hotchpot.** — Where a child has received an advancement either in realty or personalty, and wishes on the father's decease to take his share of the whole estate, he may bring his advancement into hotchpot with the rest of the estate, and he will then be entitled to his proportion of the whole.³ The value of property advanced and brought into hotchpot for distribution must be taken as of the date when the advancement was made, not the date of distribution.⁴ One receiving an advancement does not have to account for interest or profits of the same when he brings it into hotchpot with the estate and takes his distributive share.⁵

§ 838. **Gifts and Other Transactions between Parent and Child.** — Gifts between members of the same family are said not to be favored.⁶ A gift from a father to his infant child, in good faith, is as valid as if made by a stranger.⁷ The purchase of property by a child from its parent is not a badge of fraud. Presumptions are in favor

¹ *Rains v. Hays*, 6 Lea, 303; 40 Am. Rep. 39.

² *Grattan v. Grattan*, 18 Ill. 167; 65 Am. Dec. 726.

³ *Jenkins v. Mitchell*, 4 Jones Eq. 207; *Jackson v. Jackson*, 28 Miss. 674; 64 Am. Dec. 114; *Barnes v. Hazleton*, 50 Ill. 429.

⁴ *Jackson v. Jackson*, 28 Miss. 674; 64 Am. Dec. 114.

⁵ *Jackson v. Jackson*, 28 Miss. 674; 64 Am. Dec. 114.

⁶ *Schouler on Domestic Relations*, 270.

⁷ *Williams v. Walton*, 8 Yerg. 387; 29 Am. Dec. 122.

of its fairness rather than otherwise.¹ But where the parent is old and infirm, contracts made with a child are regarded with suspicion.² A voluntary conveyance to a father by a daughter just of age is to be looked upon with suspicion.³

§ 839. **Emancipation of Child.**—A father may emancipate a young child, and thus give him a right to his own earnings. Emancipation may be made by an instrument in writing or by an express oral agreement, or it may be implied from circumstances.⁴ He may do this, even though insolvent,⁵ and though the child remains at home and is hired by the father.⁶ A minor allowed by his father to live away from him, under the care and control of another, can make reasonable contracts for his services beyond the power of his father to disaffirm.⁷ Evidence that a minor was in the habit of doing business on his own account and in his own name, and that he purchased his own supplies of provisions and became responsible for them, is admissible to prove his emancipation.⁸ After emancipation, a minor may recover wages for work for his father, the same as though done for a stranger.⁹ A father who, when able to support his minor son, forces him to labor abroad for a livelihood is

¹ *State v. True*, 20 Mo. App. 176.

² *Highberger v. Stiffler*, 21 Md. 333; 83 Am. Dec. 593.

³ *Bergen v. Udall*, 31 Barb. 9.

⁴ *Schouler on Domestic Relations*, 267 et seq.; *Lyon v. Bolling*, 14 Ala. 753; 48 Am. Dec. 122; *Bobo v. Bryson*, 21 Ark. 387; 76 Am. Dec. 406; *Dennysville v. Trescott*, 30 Me. 470; *Boobier v. Boobier*, 39 Me. 406. In *State v. Bratton*, 15 Am. Law Reg. 359, it is said: "He [the father] may emancipate his child by contract, as when he consents to its adoption by another, or sends it abroad to make a living and shift for itself: *Farrell v. Farrell*, 3 Houst. 633; or abandons it to the world; by his conduct when he neglects to provide for its support, treats it with excessive cruelty, or

leads such a grossly immoral and profligate life as to endanger its morals and corrupt its heart by his evil example; by his misfortune when he becomes unable, through poverty, to maintain it, or by insanity, or by long involuntary absence during which the child, thrown on the charity of the world, has formed new relations and found a new home": *Ream v. Watkins*, 27 Mo. 516; 72 Am. Dec. 283.

⁵ *Atwood v. Holcomb*, 39 Conn. 270; 12 Am. Rep. 386; *Clemens v. Brihart*, 17 Neb. 335.

⁶ *Wilson v. McMillan*, 62 Ga. 16; 35 Am. Rep. 115.

⁷ *Wodell v. Coggeshall*, 2 Met. 89; 35 Am. Dec. 391.

⁸ *Lackman v. Wood*, 25 Cal. 147.

⁹ *Wright v. Dean*, 79 Ind. 407.

not entitled to his earnings. The law then implies an emancipation; and the son may maintain an action for money had and received, if the father appropriates the earnings to another use than that for which the son delivered them to him.¹ An agreement by a parent with his minor child to relinquish his right to his services or earnings is irrevocable.² The marriage of an infant child works an emancipation.³

ILLUSTRATIONS. — An infant son supported himself and paid his board at home, his father being insolvent. *Held*, that he was emancipated from his father's control: *Donegan v. Davis*, 66 Ala. 362. A son of one partner was apprenticed to a firm and so continued until after a general assignment for creditors, being told by his father when he entered the employ that he was to get the same wages as other apprentices, a separate account being kept in the son's name, and the father never claiming the wages nor being credited therewith, and the son on one occasion drawing a small sum on account, and receiving from the assignee the wages which he had earned after the assignment. *Held*, that it was a question for the jury whether the father had emancipated the son: *Beaver v. Bare*, 104 Pa. St. 58; 49 Am. Rep. 567. A father contracted with A for the support of the former's daughter during minority, relinquishing all control over her. After a time A failed to comply with the contract. *Held*, that the daughter could bring suit by her next friend for the consequent injury: *Strong v. Marcy*, 33 Kan. 109. A child at eight years of age, having no mother, commenced living with H. and wife; for four years after, her father paid something towards her board and furnished a portion of her clothing, when, with her consent and that of her father, H. and wife proposed to adopt her; from that time until she was twenty-one she lived in H.'s family, assumed his name, was fed, clothed, and sent to school by him, and treated by himself and wife as their own child; her father never resumed his parental duties and authority. *Held*, that the child was emancipated from the father, notwithstanding that H. and wife had

¹ *Farrell v. Farrell*, 3 Houst. 633.

² *Morse v. Welton*, 6 Conn. 547; 16 Am. Dec. 73; *Atwood v. Holcomb*, 39 Conn. 273; 12 Am. Rep. 386; *Torrens v. Campbell*, 74 Pa. St. 470.

³ *Dicks v. Grissom*, 1 Freem. Ch. 428; *Bucksport v. Rockland*, 56 Me. 22; *Hervey v. Moseley*, 7 Gray, 479;

66 Am. Dec. 515. *Contra*, *Harrod v. Myers*, 21 Ark. 592; 76 Am. Dec. 409. And it was held, in a Maine case, that where an infant married without the consent and against the wishes of the father, his earnings could continue to be claimed by the father: *White v. Henry*, 24 Me. 531.

failed to adopt her by proper proceedings in the probate court, as they had promised to do: *West Gardiner v. Manchester*, 72 Me. 509.

§ 840. Actions by or against Infants — Parties — Pleading.—An infant cannot prosecute an action either by person or by attorney. He must do so by his guardian, or by a next friend—*prochein ami*—appointed by the court.¹ The court may permit an infant to sue *in forma pauperis*, if unable to indemnify a responsible person for costs; but it would first see that there was probable cause to sue, and appoint a proper person as *prochein ami*.² Any one may sue in an infant's name, without his knowledge or consent, as next friend; but on proper application, the court will refer it to a master to ascertain whether the suit is for the infant's benefit, and if he reports that it is not, the proceedings will be stayed. The rule is different as to a suit brought in the name of a *feme covert*.³ When an infant sues by a guardian *ad litem*, the complaint must allege the due appointment of the guardian, this being a traversable fact.⁴ When the infant attains his majority, he has a right to elect whether or not he will proceed with the suit.⁵ An infant cannot appear and defend a civil suit, either in person or by attorney. If he have a guardian, he must defend for him; if he have not, then it must be done by a guardian *ad litem*, i. e., a person appointed for the infant to defend in the particular action brought against him.⁶ An infant may appear by

¹ Schouler on Domestic Relations, 450; *Apthorp v. Backus*, Kirby, 407; 1 Am. Dec. 26; *Drago v. Moso*, 1 Speer, 212; 40 Am. Dec. 592; *Byers v. R. R. Co.*, 21 Iowa, 54; *Thomas v. Dike*, 11 Vt. 273; *Hurt v. R. R. Co.*, 40 Miss. 391; *Robson v. Osborn*, 13 Tex. 298.

² *Fulton v. Roosevelt*, 1 Paige, 178; 19 Am. Dec. 409. Insolvent person suing as *prochein ami* for an infant will be required, on the defendant's application, to give security for costs.

³ *Fulton v. Roosevelt*, 1 Paige, 178; 19 Am. Dec. 409.

⁴ *Crawford v. Neal*, 56 Cal. 321.

⁵ *Shuttlesworth v. Hughey*, 6 Rich. 329; 60 Am. Dec. 130.

⁶ Schouler on Domestic Relations, 450; *Jack v. Davis*, 29 Ga. 219; *Roberts v. Maddox*, 5 Ark. 51; *McChord v. Fisher*, 13 B. Mon. 193; *Oliver v. McDuffie*, 28 Ga. 522; *Peak v. Shasted*, 21 Ill. 137; 74 Am. Dec. 83; *Swan v. Horton*, 14 Gray, 179; *Arnold v. Sandford*, 14 Johns. 417; *Delahurst v.*

a common guardian or by his next friend; if, however, he appears by attorney, no objection can be taken, after verdict, in favor of the infant.¹ A guardian *ad litem* may be appointed, either on the motion of the plaintiff or of the defendant; but the court will not permit an adverse party to select the guardian for an infant.² The court may appoint a guardian *ad litem*, though it appear that minor defendants had a guardian regularly appointed by the same court, and living within its jurisdiction.³

A guardian *ad litem* can waive none of the rights of his ward, not even by any neglect or omission.⁴ The rights of an infant defendant are not waived by a failure of its guardian *ad litem* to object to the premature hearing of a petition for partition, nor by a failure to sever from the adult defendants in assigning errors.⁵ An infant has no capacity to waive notice of citation, or any part of the formula of service.⁶ An infant defendant to a suit in equity will be protected in his rights, by the court without the filing of a cross-bill.⁷ Under a statute which provides for proceedings against non-resident defendants by publication, non-resident infants may be so proceeded against.⁸ A judgment against an infant who has been served with process is voidable, and not void.⁹ A court of equity has plenary jurisdiction over the estates and persons of infants.¹⁰ Infants are under the special protection of courts of equity, whose duty it is to vacate every judg-

Holderbaugh, 58 Ind. 235; Farris v. Richardson, 6 Allen, 118; 83 Am. Dec. 618. A guardian *ad litem* is never appointed except for an infant defendant: Priest v. Hamilton, 2 Tyler, 49; Clark v. Platt, 30 Conn. 282.

¹ Apthorp v. Backus, Kirby, 487; 1 Am. Dec. 26; Schermerhorn v. Jenkins, 7 Johns. 373.

² Ralston v. Lahee, 8 Iowa, 17; 74 Am. Dec. 291.

³ Alexander v. Frary, 9 Ind. 481.

⁴ Cartwright v. Wise, 14 Ill. 417; Quigley v. Roberts, 44 Ill. 503; Pugh v. Pugh, 9 Ind. 132.

⁵ Jones v. Jones, 56 Ala. 612.

⁶ Winston v. McLendon, 43 Miss. 254.

⁷ Gilmore v. Gilmore, 109 Ill. 277.

⁸ Bryan v. Kennett, 113 U. S. 179.

⁹ Syme v. Trice, 96 N. C. 243; Cates v. Pickett, 97 N. C. 21; Parker v. Starr, 21 Neb. 680. But an infant is not bound by his acceptance of service: See Whitesides v. Barber, 24 S. C. 373.

¹⁰ Preston v. Dunn, 25 Ala. 507; Smith v. Sackett, 10 Ill. 534; Succession of Landry, 11 La. Ann. 85; Johnson v. Erbert, 17 Abb. Pr. 395.

ment and decree by which injustice has been done to them.¹ The court, in the interest of infant children of a deceased lessor, may extend the period of redemption.² A decree cannot be taken *pro confesso* against an infant.³ An absolute decree against infants, without giving them a day after they come of age to show cause against it, will be reversed.⁴ No decree can be taken against an infant on his own admissions, or those of his guardian *ad litem*; but every allegation, to affect him, must be duly proven.⁵

An infant defendant is as much bound by a decree against him in equity as a person of full age; therefore, if there be an absolute decree against a defendant who is under age, he will not be permitted to dispute it, unless upon such grounds as an adult might have disputed it, as fraud, collusion, or error. To impeach the decree on the ground of fraud or collusion, he may proceed either by bill of review, or by original bill. To impeach it on the ground of error, he may proceed by original bill; and he is not obliged to wait for that purpose until he has arrived at the age of twenty-one.⁶ In ordinary cases where an infant is allowed time after his arrival at the age of twenty-one years to show cause against a decree, the decree in such cases is deemed complete; but the infant has the time allowed to show cause against it. If no cause is shown within the time specified, the infant is bound.⁷ Infants must be made parties to bills in equity affecting their title to real estate; making their guardians parties is not sufficient.⁸ The action must be

¹ *Newland v. Gentry*, 18 B. Mon. 666; *Berrett v. Olliver*, 7 Gill & J. 191; *Lefevre v. Laraway*, 22 Barb. 167.

² *Taylor v. Peabody Heights Co.*, 65 Md. 388.

³ *Wells v. Smith*, 44 Miss. 296; *McIlvoy v. Alsop*, 45 Miss. 365; *Dailey v. Reed*, 74 Ala. 415.

⁴ *Beeler v. Bullitt*, 4 Bibb, 11; *Shield v. Bryant*, 3 Bibb, 525; *Passmore v. Moore*, 1 J. J. Marsh. 591; *Jones v. Adair*, 4 J. J. Marsh. 220; *Arnold v. Voorhies*, 4 J. J. Marsh. 507;

Searcey v. Morgan, 4 Bibb, 96; *Regla v. Martin*, 19 Cal. 463; *Harris v. Younman*, 1 Hoff. Ch. 178; *Smith v. Bradley*, 14 Miss. 485; *Creath v. Smith*, 20 Mo. 113. But see *Joyce v. McAvoy*, 31 Cal. 273; 89 Am. Dec. 172.

⁵ *Ingersoll v. Ingersoll*, 42 Miss. 155; *Johnson v. McCabe*, 42 Miss. 255.

⁶ *Daniell's Chancery Practice*, 205.

⁷ *McPherson on Infants*, 412; 1 *Daniell's Chancery Practice*, c. 4, sec. 8.

⁸ *Tucker v. Bean*, 65 Me. 352.

against the adult only on a contract with an infant and an adult.¹ Where a suit is brought, not to enforce a claim or lien upon property, but to cancel a purely personal contract, the United States circuit court cannot acquire jurisdiction of defendant, unless he appear, or there be personal service of process upon him in the district. If he is an infant, the decree against him is void on its face, the record showing affirmatively the non-service of process, although a guardian *ad litem* was appointed for him in his absence.² Infancy may be specially pleaded in bar.³ In New York and other states, infancy may be set up under the general issue.⁴ An action begun while the defendant was a minor, upon a contract not for necessities made by him, in answer to which he sets up his infancy at the time the contract was made, cannot be maintained upon evidence of ratification after he became of age.⁵

ILLUSTRATIONS. — An infant gave a mortgage which was foreclosed some time after she became of age, and though personally served, she allowed the bill to be taken as confessed, apparently without any disposition to contest it. *Held*, that she had no equity entitling her to set up the defense of infancy to defeat a subsequent bill brought by an assignee of the foreclosure decree to enforce it against her: *Terry v. McClintock*, 41 Mich. 492.

¹ *Connolly v. Hull*, 3 McCord, 6.

² *New York Life Ins. Co. v. Bangs*, 103 U. S. 435.

³ *Schouler on Domestic Relations*, 451.

⁴ *Wailing v. Toll*, 9 Johns. 141. By

pleading infancy, defendant elects to avoid his agreement by reason thereof: *Pakas v. Racy*, 13 Daly, 227. *Aliter*, in other states: *Drago v. Moso*, 1 Speer, 212; 40 Am. Dec. 592.

⁵ *Freeman v. Nichols*, 138 Mass. 313.

TITLE VI.
GUARDIAN AND WARD.

TITLE VI.

GUARDIAN AND WARD.

CHAPTER XLVII.

GUARDIAN AND WARD.

- § 841. Guardian defined.
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- § 888. Suits against guardian by ward, and ward by guardian.

§ 841. **Guardian Defined.** — A guardian is a person having the right and duty of protecting the person, property, or rights of some one who is supposed to be incapable of managing his own affairs. The latter is called the ward.¹ Guardianship is either of the person or of the estate of the ward. The same person is usually guardian of both, but there may be different guardians as to each.

There were various kinds of guardians at common law which do not exist at the present time. An English writer names eleven, most of which are of no interest to the modern practitioners. Among the species of guardianship existing at the present time in this country are the following: —

§ 842. **Guardianship by Nature and Nurture.** — Guardianship by nature and nurture belongs exclusively to the parents, — first to the father, and on his death to the mother.² This kind of guardianship extends only to the person of the child; the parents have no right to inter-

¹ Rapalje and Lawrence's Dictionary, tit. Guardian.

² Hammond v. Cobbett, 50 N. H. 501; 9 Am. Rep. 288; Matthewson v. Perry, 37 Conn. 435; 9 Am. Rep. 339; Combs v. Jackson, 2 Wend. 153; 19 Am. Dec. 568; Helms v. Francisca,

2 Bland, 544; 20 Am. Dec. 402; In re Van Houten, 3 N. J. Eq. 220; 29 Am. Dec. 707; McKinney v. Noble, 37 Tex. 731; Taylor v. Jeter, 33 Ga. 195; 81 Am. Dec. 202; Earl v. Dresser, 30 Ind. 11; 95 Am. Dec. 660.

meddle with the child's property,¹ nor are they responsible for its safety.² A father of infant plaintiffs, as such, has no right to demand the money of the infants; and where they reside out of the state, a guardian should be appointed in order to make a valid demand.³ Guardians by nature and nurture are appointed by the law; that is to say, the law designates the father, and after him, the mother, as the natural guardian of the infant. The appointment of another person guardian of an infant, if the father was not a party to the application, does not imply an adjudication against the father's fitness, or impair his prior right to the guardianship; and the court of chancery has jurisdiction to take the child from the statutory guardian and restore it to the father.⁴

§ 843. Guardianship in Socage.—Guardianship in socage arose at common law whenever an infant under fourteen acquired title to real estate by descent.⁵ It devolved by law upon the nearest blood relative of the infant who was incapable or could not possibly inherit the property.⁶ The guardian in socage took possession of the estate until the infant reached the age of fourteen, when he was allowed to select his own guardian.⁷ Guardianship in socage, though not expressly abolished in this country, has fallen into disuse on account of the other

¹ See *Title Parent and Child*; *Graham v. Houghtalin*, 30 N. J. L. 552; *Combs v. Jackson*, 2 Wend. 153; 19 Am. Dec. 568; *Hyde v. Stone*, 7 Wend. 354; 22 Am. Dec. 582; *Haynie v. Hall*, 5 Humph. 290; 42 Am. Dec. 427; *Ross v. Cobb*, 9 Yerg. 463; *Linton v. Walker*, 8 Fla. 144; 71 Am. Dec. 105; *Shanks v. Seamonds*, 24 Iowa, 131; 92 Am. Dec. 465. The provision of the Georgia code, section 1794, declaring that a "natural guardian is not entitled to demand or receive the property of a minor until he or she has given bond to the ordinary," does not make such receipt illegal in such a sense that the person

paying it cannot recover it back, or show that it has in fact been accounted for by the natural guardian to the ward, or applied to the benefit of the ward: *Southwestern R. R. Co. v. Chapman*, 46 Ga. 557.

² *French v. Hoyt*, 6 N. H. 370; 25 Am. Dec. 464.

³ *Williams v. Storrs*, 6 Johns. Ch. 353; 10 Am. Dec. 340.

⁴ *Collins v. Warner*, 32 Ark. 87.

⁵ *Quadrang v. Downs*, 2 Mod. 176.

⁶ *Schouler on Domestic Relations*, sec. 286; *Combs v. Jackson*, 2 Wend. 153; 19 Am. Dec. 568.

⁷ *Byrne v. Van Hoesen*, 5 Johns. 66; *Snoek v. Sutton*, 10 N. J. L. 133.

species of guardianship, referred to in the following sections. Guardians in socage also derive their authority from the law, and not from any special appointment.

§ 844. **Testamentary Guardians.**—By a statute of Charles II., it was enacted that any father, whether an infant or of full age, could, by a deed executed in his lifetime, or by his last will and testament, dispose of the custody and tuition of his children, born or unborn, to any persons except Papists, such custody to last until they became of age, and to embrace the entire management of their estate, both real and personal.¹ This statute, with some changes, has been adopted in most of our states.² All of them omit the Papist disqualification; some of them allow the mother as well as the father to appoint;³ others restrict the right to such parents as are competent to make a will or deed, thus excluding infant parents.⁴ The appointment of a testamentary guardian supersedes all other kinds of guardianships,⁵—the guardian by nature of the mother after the death of the father,⁶ the probate or orphans' court guardianship.⁷ A testamentary guardian requires no further appointment except that by the will. By statute, however, in some states, probate of the will is necessary before he can act, or his appointment must be approved by the court.⁸ To constitute a guardian, express words of appointment are not necessary; any words will do if the father's word is apparent; but the language must be such as to imply a right to the cus-

¹ Schouler on Domestic Relations, 287.

² Balch v. Smith, 12 N. H. 441; Com. v. Hearne, 10 Phila. 199.

³ Schouler on Domestic Relations, 290; In re Reynolds, 11 Hun, 41. *Contra*, Ex parte Bell, 2 Tenn. Ch. 327.

⁴ Schouler on Domestic Relations, 290.

⁵ Reeve on Domestic Relations, 454.

⁶ In re Van Houten, 3 N. J. Eq. 220; 29 Am. Dec. 707.

⁷ People v. Kearney, 19 How. Pr. 493; Robinson v. Zollinger, 9 Watts, 169; Lord v. Hough, 37 Cal. 665; Copp v. Copp, 20 N. H. 284.

⁸ Schouler on Domestic Relations, 300. A testamentary guardian can only be appointed by an instrument admitted to probate, and naming the person intrusted with the care and nurture of the infant: Desribes v. Wilmer, 69 Ala. 25; 44 Am. Rep. 501.

today, control, and protection of the ward.¹ A grandfather has no right to appoint a testamentary guardian for his grandchildren.² A father has no right to appoint a testamentary guardian of an illegitimate child.³ But it seems that the mother has.⁴ After the mother, the father is the proper person to apply for the guardianship of a bastard.⁵ A testator cannot appoint a testamentary guardian except to his own children. But an attempt to create one for others may create a trust.⁶ A testamentary guardian cannot, by will, transfer the custody of his ward.⁷

ILLUSTRATIONS.—A, by will, gave his property to his wife and children, the wife to hold the whole during the minority of the children, and providing that she should “clothe, maintain, and educate his children in the best manner that the circumstances of the estate given or to be given to her would allow, and that she should consult his executors named in the will as to the mode of his said children’s education.” *Held*, that this did not constitute the executors testamentary guardians of his children: *Gaines v. Spann*, 2 Brock. 81. A’s mother confided her custody to B to be educated in the Catholic faith; and after the mother’s death, on *habeas corpus* by C, an aunt of A, A’s custody was by the supreme court awarded to B. Afterwards D, another aunt of A, without mentioning that proceeding, procured from the surrogate letters of guardianship. *Held*, that B should, on petition therefor, be appointed guardian of A, unless D traverse B’s allegation that A’s interests required appointment of another than B: *Bolling v. Coughlin*, 5 Redf. 116. A testator bequeathed his son a certain sum of money to be invested as his executors should think best, and also ordered “from the proceeds or dividends to educate him in the best manner, under the direction of my said executors.” *Held*, not sufficient to constitute his executors testamentary guardians: *Kevan v. Waller*, 11 Leigh, 414; 36 Am. Dec. 391. A decree of divorce was granted for the fault of the husband, and the custody of the child was given to the mother. *Held*, that the

¹ *Kevan v. Waller*, 11 Leigh, 414; 36 Am. Dec. 391.

² *Hoyt v. Hilton*, 2 Edw. Ch. 202; *Fullerton v. Jackson*, 5 Johns. Ch. 278; *Williams v. Jordan*, Busb. Eq. 46.

³ *Tyler on Infancy and Coverture*, 253; *Bingham on Infancy and Coverture*, 164.

⁴ See Cal. Civ. Code, 1880, sec. 241; Dakota Code, 1877, p. 251, sec. 122.

⁵ *Pote’s Appeal*, 106 Pa. St. 574; 51 Am. Rep. 540.

⁶ *Camp v. Pittman*, 90 N. C. 615.

⁷ *Taylor v. Jeter*, 33 Ga. 195; 81 Am. Dec. 202.

father had no further control of the child; and that a guardian appointed by the will of the mother was entitled to the guardianship of the child as against the father: *Wilkinson v. Deming*, 80 Ill. 342; 22 Am. Rep. 192. A testator directed his executors to convert his estate into money, and after paying legacies, to use the proceeds for the support and education of his minor children, and to hold the estate in trust until the youngest child should become of age; and added: "I will that my executors pay from my estate annually a sum sufficient to clothe, educate, and support my minor children until they become of lawful age." *Held*, that these provisions made the executors trustees, and in effect testamentary guardians, with the duty of clothing, educating, and supporting the minors, and that while faithfully discharging their duties they could not be required to pay over moneys to statutory guardians: *Capps v. Hickman*, 97 Ill. 429. A testator divided the residue into equal parts, a certain number of which he gave to an infant son, and appointed the executors "guardians and trustees." *Held*, that the executors were not constituted trustees, but guardians simply: *In re Hawley*, 104 N. Y. 250.

§ 845. Guardianship in Chancery.—The court of chancery, in the exercise of its jurisdiction over infants, early assumed jurisdiction to appoint guardians for them. This jurisdiction has also been adopted in this country.¹ The chancery court may appoint a guardian of an infant's estate. The jurisdiction conferred by statute on the county court is not exclusive. If, subsequently, however, a general guardian is appointed by the county court under the statute, the limited guardian appointed by the chancery court will be required to turn over the estate to such general guardian.² Indeed, it has been held that the court of chancery has jurisdiction to remove a guardian appointed by the probate court.³

§ 846. Probate Guardianship.—But in the United States most guardians take their appointment from

¹ Schouler on Domestic Relations, 291; *Durrett v. Davis*, 24 Gratt. 302; *Waring v. Waring*, 2 Bland, 623; *In re Andrews*, 1 Johns. Ch. 99; *People v. Wilcox*, 22 Barb. 178. An equitable wardship is said to arise where a son takes charge of his father's affairs in the

belief that the latter is incompetent to manage them, and the father passively submits: *Jacox v. Jacox*, 40 Mich. 473; 29 Am. Rep. 547.

² *Lake v. McDavitt*, 13 Lea, 26.

³ *Wilcox v. Wilcox*, 14 N. Y. 575.

special courts which have been established with us with powers somewhat resembling those of the English ecclesiastical courts. These courts are known indifferently, as the case may be, in different states, as probate, orphans', ordinary's, or surrogate's courts.¹ In New England and most of the western states, probate guardians are appointed by the judge of probate; in New York, by the surrogate; in New Jersey, by the orphans' court or the ordinary; in Pennsylvania and Maryland, by the orphans' court; in Ohio, by the court of common pleas with chancery powers; in California, by the district courts possessing a similar jurisdiction; in Virginia, and in North and South Carolina, the chancery and county courts have exercised a sort of concurrent jurisdiction; in others of the southern states there are orphans' courts; in Louisiana, the civil law has prevailed.² Under a statute authorizing the court of common pleas to appoint guardians for minors resident in the county, it has been held that the court had no authority to appoint a guardian of the "unknown heirs of A "; that such appointment was void, and any sales by such guardians could pass no title.³ The word "orphan," in a statute giving jurisdiction to the probate court to appoint guardians to orphans, means a fatherless child.⁴ Under a statute which enacts that the surrogate "must" appoint a special guardian, no application is necessary. He may act on his own motion whenever the infant's interests require it; and this, though there is a general guardian.⁵

ILLUSTRATIONS. — A father, by an instrument in writing, surrendered his infant children to the custody of a charitable institution, with the powers and subject to the provisions contained in its act of incorporation. *Held*, that, notwithstanding such surrender, the surrogate might appoint a general guardian

¹ Schouler on Domestic Relations, 291.

² Schouler on Domestic Relations, sec. 303; *Herring v. Goodson*, 43 Miss. 392; *Glasscott v. Warner*, 20 Wis. 654;

Grier v. McLendon, 7 Ga. 362; *Dorman v. Ogbourne*, 16 Ala. 759.

³ *State v. McLaughlin*, 77 Ind. 335.

⁴ *Stewart v. Morrison*, 38 Miss. 417.

⁵ *In re Ludlow*, 5 Redf. 391.

of the children: *Kearney v. Brooklyn etc. School*, 1 Redf. 292. On B.'s petition for guardianship of O., a boy of ten years, it appeared that a German society had paid for the burial of O.'s father, and passed a resolution requesting the surrogate to appoint B. the guardian; that O. was entitled to one thousand dollars from the Order Germania; that B. was a competent, upright married man, without children, and keeper of a beer-saloon; that O.'s mother and father had separated, in consequence of her having visited Philadelphia with another man; that she was keeping a disreputable Bowery saloon; and that O. had lived with B., to whom the father had informally committed O.'s custody, three years, and wished to stay there. *Held*, that B.'s petition should be granted, and the mother's refused: *Burmester v. Orth*, 5 Redf. 259.

§ 847. **Guardian by Appointment of Infant.**—At common law, as we have seen, an infant on reaching fourteen might supersede his guardian in socage by a guardian of his own choice. In the case of a chancery guardian, the court will, if the infant is of the age of discretion, permit the infant to select his guardian or approve his nomination.¹ And the statutes generally give infants, if over fourteen, the right of selecting their guardians, subject to the approval of the probate courts.² The orphans' court has no right to appoint a guardian for an infant who is over the age of fourteen, unless from some cause he is incompetent to exercise his right of choice.³ It cannot control the right of a minor above fourteen years of age to choose a new guardian, although no personal unfitness on the part of the existing guardian is shown.⁴ In Alabama, upon the application of a minor who has arrived at the age of fourteen years, the orphans' court is authorized to appoint such guardian as the minor may elect, without notice to the guardian previously appointed.⁵ In Georgia, a minor may choose his own guardian at the age of fourteen; but this discretion will be so far con-

¹ Schouler on Domestic Relations, 301.

² Arthur's Appeal, 1 Grant Cas. 55.

³ Schouler on Domestic Relations, 301.

⁴ Lewry's Estate, 12 Phila. 120.

⁵ Kelly v. Smith, 15 Ala. 687.

trolled by the ordinary that he may refuse to sanction an unwise or improvident selection.¹ It is not obligatory upon the ordinary, or upon the superior court on appeal, to supersede the mother as natural guardian of a daughter over fourteen years of age, and appoint the nominee of the latter; and when the mother, though no longer a widow, offers bond and satisfactory security, and where she is not shown to be unfit morally, mentally, or otherwise, to bring up her daughter and manage her estate, a judgment rejecting the nominee and appointing the mother will not be disturbed.² The infant having once made his selection, cannot nominate again, but is bound by his first choice.³

§ 848. Guardians of Lunatics — Committee — Guardians of Spendthrifts, Drunkards, etc. — Guardians are also appointed by the courts of chancery or the probate courts to take charge of the person and affairs of a lunatic or insane person. They are generally named either conservators, overseers, or the "committee of a lunatic."⁴ They cannot be legally appointed without notice to the lunatic,⁵ and without a judicial decree that the person is a lunatic.⁶ The court has jurisdiction to issue a commission of lunacy against a person domiciled abroad, if such person has real estate within the jurisdiction of the court.⁷ A court clothed by statute with a general power of care and custody of lunatics and their estates may direct a lunatic foreigner found within its jurisdic-

¹ *Inferior Court v. Cherry*, 14 Ga. 594.

² *Beard v. Dean*, 64 Ga. 258.

³ *Lee's Appeal*, 27 Pa. St. 229.

⁴ *Schouler on Domestic Relations*, 293. In New Hampshire, selectmen and overseers of the poor have not *ex officio* any right to control and restrain the person of a lunatic: *Colby v. Jackson*, 12 N. H. 526.

⁵ *Eslaver v. Lepretre*, 21 Ala. 504; 56 Am. Dec. 266; *Eddy v. People*, 15 Ill. 386; *Allis v. Morton*, 4 Gray, 63;

In re Russell, 1 Barb. Ch. 38; *Morton v. Sims*, 64 Ga. 298. The jurisdiction of the probate court to appoint a guardian for a mentally incompetent person is wholly statutory; and if the statutory notice is not given to the person as required, the jurisdiction does not attach: *North v. Joslin*, 59 Mich. 624.

⁶ *Kimball v. Fisk*, 39 N. H. 110; 75 Am. Dec. 213; *Moody v. Bibb*, 50 Ala. 245.

⁷ *In re Ganse*, 9 Paige, 416.

tion to be returned to his home out of the jurisdiction.¹ A court of equity has inherent power to order a sale of a lunatic's real estate.² An inquisition of lunacy will not be set aside for mere irregularity, where there is no doubt of the fact of lunacy.³ Appointment of a guardian of an insane person is not invalidated by want of notice to the alleged insane person of the time when the decree should be entered, where there is no other irregularity, the party having had due notice of the proceedings before inquisition, and having appeared, and having been fully heard on the application to declare him *non compos mentis*.⁴ When a statute provides how an inquisition of lunacy shall be taken in the case of a public officer, the statutory proceeding must be pursued.⁵ The appointment of a guardian for an insane person is a determination of the fact of insanity, and will be presumed to have been made under jurisdiction properly acquired in compliance with the forms of law.⁶ Letters of guardianship of a lunatic issued by a probate court cannot be questioned in a collateral proceeding.⁷ A commission in lunacy will not be superseded where the petitioner, previously found insane by a jury, is liable at any moment to become excited beyond control, and requires constant supervision; when his property may be squandered; when in fact he is an insane man with lucid intervals.⁸ The fact of insanity having been judicially ascertained, the law presumes its continuance until a restoration to sanity or a lucid interval is established. A discharge from the lunatic asylum because the officers adjudged the patient restored would be at least *prima facie* evidence of such restoration.⁹ The power of a probate court to appoint a

¹ *In re Colah*, 3 Daly, 529; *Merchant's Case*, 11 Abb. Pr., N. S., 209.

² *Dodge v. Cole*, 97 Ill. 338; 37 Am. Rep. 111; *Palmer v. Garland*, 81 Va. 444, where a private sale was ordered.

³ *In re Rogers*, 9 Abb. N. C. 141.

⁴ *Davison v. Johonnot*, 7 Met. 388; 41 Am. Dec. 448.

⁵ *State v. Baird*, 47 Mo. 301.

⁶ *Ockendon v. Barnes*, 43 Iowa, 615.

⁷ *Warner v. Wilson*, 4 Cal. 310.

⁸ *In re Helmbold*, 12 Phila. 424.

⁹ *Haynes v. Swann*, 6 Heisk. 560.

guardian for an insane person is not defeated by the fact that such person is married.¹

In a proceeding to put one under guardianship, it is enough to aver that by reason of extreme old age and other causes he is mentally incompetent to have charge of his property;² but the appointment is not warranted by evidence that he was aged, and had become wasteful of his property under the influence of profligate children.³ A person deaf and dumb from birth is not on that account to be deemed *non compos*.⁴ An emancipated negro woman needs no guardian of her person or property to enable her to receive or grant an estate.⁵

The father of a lunatic, having the custody of his estate, should be appointed his committee.⁶ Where a married woman becomes insane, and stands in need of a guardian, and the husband is otherwise a suitable person, he should be preferred to a third person.⁷ On filing the proper petition for the appointment of a guardian of the person and estate of one alleged to be insane, and on giving the notice required by the statute, the probate court acquires jurisdiction to adjudicate the question of insanity, and to select a guardian, and is not restricted as to the person to be appointed guardian, even if the petition asks that the petitioner be appointed.⁸ A mere stranger to an alleged idiot, with no allegation of relationship to her, or present or prospective interest in her property, cannot appeal from an order appointing her guardian.⁹

The guardians of a lunatic have generally the same powers, and are subject to the same liabilities, as the guardians of infants.¹⁰ The committee or guardian can-

¹ *In re Fegan*, 45 Cal. 176.

² *Norton v. Sherman*, 58 Mich. 549.

³ *Darling v. Bennet*, 8 Mass. 129.

⁴ *Markle v. Markle*, 4 Johns. Ch. 163; *Brower v. Fisher*, 4 Johns. Ch. 441.

⁵ *Webster v. Heard*, 32 Tex. 685.

⁶ *Coleman v. Comm'rs*, 6 B. Mon. 239.

⁷ *Drew's Appeal*, 57 N. H. 181.

⁸ *Halett v. Patrick*, 49 Cal. 590.

⁹ *Rorback v. Van Blarcom*, 20 N. J. Eq. 461.

¹⁰ *Dearman v. Dearman*, 5 Ala. 202; *Alexander v. Alexander*, 8 Ala. 796.

not bind the lunatic by contract,¹ but out of his estate they may provide him and his family with necessities.² Ordinarily, they cannot enter into any contract without an order of court.³ If the committee of a lunatic employs an attorney, the attorney must look to the committee for compensation, and not to the fund.⁴ They may lease his lands, but not for a term beyond his restoration to reason.⁵ They cannot relinquish the dower of an insane wife;⁶ nor can they make election for her between her dower and the provision in her husband's will in lieu thereof.⁷ They cannot maintain ejectment against the lunatic's wife to eject her and the children from the home provided for them by him while sane.⁸ They may change his domicile,⁹ and confess judgment against him,¹⁰ or waive objections to the admission of testimony.¹¹ They may maintain an action against one who sold the lunatic stock known by the seller to be worthless, even though the seller did not know the buyer to be a lunatic, and made no false representations;¹² or may execute a conveyance of the land of their insane ward, and the wife of the ward may release her dower by joining in the guardian's deed;¹³ or may settle with their ward after he has recovered his reason, and they are not obliged to have their accounts passed through the probate court.¹⁴

The guardian has no right to subject his ward's property to the hazards of business, nor can the probate court authorize him to do it.¹⁵ One of two guardians of a spendthrift is competent to receive payment of a debt due to the

¹ *Pearl v. McDowell*, 3 J. J. Marsh. 658; 20 Am. Dec. 199.

² *Pearl v. McDowell*, 3 J. J. Marsh. 658; 20 Am. Dec. 199.

³ *In re Cotah*, 6 Daly, 59.

⁴ *Kowing v. Moran*, 5 Demarest, 56.

⁵ *De Treville v. Ellis*, 1 Bail. Eq. 35; 21 Am. Dec. 519.

⁶ *Eslava v. Lepretre*, 21 Ala. 504; 56 Am. Dec. 266.

⁷ *Kennedy v. Johnston*, 65 Pa. St. 451; 3 Am. Rep. 650.

⁸ *Shaffer v. List*, 114 Pa. St. 486.

⁹ *Anderson v. Anderson*, 42 Vt. 350; 1 Am. Rep. 334.

¹⁰ *McAder v. Hooker*, 74 N. C. 24.

¹¹ *Collins v. Trotter*, 81 Mo. 275.

¹² *Johnson v. Stone*, 35 Hun, 380.

¹³ *Rannells v. Gerner*, 9 Mo. App. 506.

¹⁴ *Hooper v. Hooper*, 26 Mich. 435; *Johnston v. James*, 48 Ga. 554.

¹⁵ *Michael v. Locke*, 80 Mo. 548.

ward, and his receipt is *prima facie* evidence of the payment.¹ He is not chargeable as trustee at the suit of creditors of the ward until there has been an accounting and a balance found in the guardian's hands.² He is not liable personally for rent accruing on the unexpired term of a lease, where he does not take possession of the premises.³ The reasonable expenses incurred in good faith by the guardian of an insane person, in resisting the application for a revocation of the guardianship on the ground of his restoration to sanity, are to be allowed to him in the settlement of his guardianship account.⁴ A man of wealth, and having no family dependent upon him, under guardianship as insane, should be allowed those luxuries which he desires and can enjoy, which are unobjectionable in themselves, and would be proper and reasonable expenditures for a sane man in a similar position.⁵ He cannot bring a bill in equity against the ward for a settlement of his accounts, and to obtain payment of the sum found due him; nor can he maintain an action in equity for the value of necessities furnished the lunatic during the period of his guardianship, nor previously thereto, while he resided with him as a member of his family.⁶ Nor will he be allowed in his probate account the amount of damages occasioned to his own property by his ward's want of care.⁷

When the committee of a lunatic is charged in his account with the annual interest on money of the lunatic in his hands, he is entitled to his commission upon such interest.⁸ The guardian of a person *non compos mentis* who is entitled to a pension from the United States is not bound to apply the pension money in his hands to the

¹ Raymond v. Wyman, 18 Me. 385.

² Davis v. Drew, 6 N. H. 399; 25 Am. Dec. 467.

³ In re Otis, 38 Hun, 597; 101 N. Y. 580. But *aliter* where he takes possession of the premises: In re Otis, 34 Hun, 542.

⁴ Palmer v. Palmer, 38 N. H. 418.

⁵ May v. May, 109 Mass. 252.

⁶ Tally v. Tally, 2 Dev. & B. Eq. 385; 34 Am. Dec. 407.

⁷ Brown v. Howe, 9 Gray, 84.

⁸ Bird v. Bird, 21 Gratt. 712.

payment of pre-existing debts of his ward.¹ Equity will require the guardian of a lunatic to redeem, for the benefit of the wife, her jewels, pawned by the husband while sane, to pay his personal expenses, the proceeds being actually so applied.² The committee are personally liable for the negligent management of the lunatic's estate, just as the guardian of a minor is.³ One who voluntarily expends money in the support of a lunatic cannot recover for such expenditure, either against the lunatic or his committee.⁴ The personal property of an insane person is not attachable in the hands of the guardian.⁵ He is not liable to be assessed and taxed for money on hand or money due.⁶ He cannot be held liable for board and expenses in an insane asylum, where the evidence shows that he was admitted under a contract with others to pay his board and expenses.⁷ Under the laws of Pennsylvania, the creditors of a defendant found lunatic by due course of law cannot issue and levy an execution on his personal property in the hands of the committee appointed by the court. The only remedy of the creditor against the personal estate of the lunatic found such by inquisition, in order to obtain payment of his debts, is by an application to the court, who will require the committee to raise the necessary funds from the lunatic's estate for that purpose.⁸

A suit in behalf of a lunatic must be brought in his name, and not in that of his guardian.⁹ The complaint should show that the right of action is in the insane person, and should not allege the cause of action to be in the guardians.¹⁰ To obtain an order of reference to a master to inquire whether a lunatic is restored, a petition

¹ *Fuller v. Wing*, 17 Me. 222.

² *In re Harrall*, 31 N. J. Eq. 101.

³ *De Treville v. Ellis*, 1 Bail. Eq. 35; 21 Am. Dec. 518.

⁴ *Hehn v. Hehn*, 23 Pa. St. 415.

⁵ *Hale v. Duncan*, Brayt. 132.

⁶ *Hunt v. Lee*, 10 Vt. 297.

⁷ *Mass. Gen. Hospital v. Fairbanks*, 129 Mass. 78; 37 Am. Rep. 303.

⁸ *In re Eckstein*, 1 Pa. L. J. 224.

⁹ *Reed v. Wilson*, 13 Mo. 28.

¹⁰ *Bearss v. Montgomery*, 46 Ind. 544.

should be presented from the lunatic and the committee.¹ The answer of a defendant of unsound mind should be by committee.² Yet if he has no committee, his defense may be made by a guardian *ad litem*.³ Judgment is properly rendered against the lunatic, and not against his guardian.⁴ It is a good cause for removing the trustee or committee of a lunatic that he is not a resident of the state.⁵

In several of the states spendthrifts and persons guilty of excessive drinking, gambling, debauchery, or idleness may be put under guardianship.⁶ To warrant the appointment of a guardian of a "spendthrift," there must be evidence of bad habits, of excessive drinking, gaming, idleness, debauchery, or the like. Proof of weak-minded habits in the management of money is not enough.⁷ The guardian of a spendthrift will be held responsible for all losses which arise in consequence of his disregard of the terms of his license to sell the real estate of his ward, both in respect to the manner of making the sale and the disposition of proceeds; and his ward's assent to his proceedings will not exonerate him from his responsibility.⁸ The committee of an habitual drunkard should not be allowed much, if anything, for spending money furnished him.⁹ Where a pensioner is put under guardianship as a spendthrift, his pension is transferable to the guardian by authority of law.¹⁰ A spendthrift under guardianship cannot even make acknowledgment that will take his debt

¹ In re Price, 8 N. J. Eq. 533.

² Aldridge v. Montgomery, 9 Ind. 302.

³ Steifel v. Clark, 9 Bart. 466.

⁴ Walker v. Clay, 21 Ala. 797.

⁵ Morgan's Case, 3 Bland, 332.

⁶ See statutes of New Hampshire, Massachusetts, Vermont, Illinois, Minnesota, Nebraska, and Oregon, cited in 1 Stimson's Statute Law, 766; L'Amoureux v. Crosby, 2 Paige, 422; 22 Am. Dec. 655. Guardians of spendthrifts have no control of the persons

of their wards: Boyden v. Boyden, 5 Mass. 427. It is competent for a statute to make the adjudication of spendthrift's disability relate back to the time of the commencement of proceedings against him: Chandler v. Simmons, 97 Mass. 508; 93 Am. Dec. 117.

⁷ Morey's Appeal, 57 N. H. 54.

⁸ Harding v. Larned, 4 Allen, 426.

⁹ Stephens v. Marshall, 23 Hun, 641.

¹⁰ Cushing v. Hale, 8 Vt. 44.

out of the statute of limitations; but his guardian may bind the ward's estate by such an acknowledgment.¹

§ 849. **Guardians of Married Women.**—Also by statute in most of the states, guardians for married women may be appointed by the court.²

§ 850. **Other Statutory Guardians.**—Other statutory guardians may be mentioned; such as guardians of the poor, also special guardians of a fund during a judicial controversy.

§ 851. **Guardians ad Litem.**—A guardian *ad litem* is one appointed to represent an infant defendant in a legal proceeding.³ An answer filed by a guardian *ad litem* is proof of notice to him of the appointment and of his acceptance.⁴ It is only where there is no committee, or where there is a conflict of interest between the committee and the lunatic, that it becomes necessary to appoint a guardian *ad litem* for an insane defendant.⁵ Mere irregularities in the appointment of a guardian *ad litem* not affecting a substantial right will not vitiate the proceedings; certainly not, where such irregularities are attacked collaterally.⁶ The appointment of plaintiff's attorney as guardian *ad litem* for an infant defendant is wholly unauthorized; and this is so, although the plaintiff in the suit and an adult defendant consented of record to the appointment.⁷ The guardian *ad litem* must protect the rights of his ward, and it is his special duty to ascertain and bring these rights directly under the consideration of the court for decision; for the court will not suffer the ward to be prejudiced, either by the admissions or laches of the guardian.⁸

¹ Chandler v. Simmons, 97 Mass. 508; 93 Am. Dec. 117.

² Schouler on Domestic Relations, 294.

³ See Title Parent and Child, § 872.

⁴ Beeler v. Bullitt, 3 A. K. Marsh. 280; 13 Am. Dec. 161.

⁵ Hinton v. Bland, 81 Va. 588.

⁶ Ward v. Lowndes, 96 N. C. 367.

⁷ Sargeant v. Rowsey, 89 Mo. 617.

⁸ Long v. Mulford, 17 Ohio St. 484; 93 Am. Dec. 638.

§ 852. Territorial Jurisdiction of Court to Appoint.—

Letters of guardianship, in the case of a resident person obtained in the wrong county, are null and void, and may be collaterally impeached in any court.¹ So may the appointment of a guardian of children resident in another state.² Where a non-resident has property lying in different places, the court where proceedings are first commenced retains jurisdiction,³ and letters properly issued are not revoked by the removal of the ward to another county.⁴ Where an infant resides in another state, but has property here, and has guardians appointed in both jurisdictions, the foreign guardian has the custody of his person, and the domestic guardian has control of his property, and neither can interfere with the other.⁵ Where the ward is non-resident, guardianship is frequently recognized for the collection and preservation of his estate in the jurisdiction; and in such cases the court where the property is situated appoints some friend of the minor on his behalf, requiring proper security, the existence and *situs* of the property determining the jurisdiction.⁶ Letters of guardianship are by

¹ Schouler on Domestic Relations, 303, citing *Ware v. Coleman*, 6 J. J. Marsh. 198; *Sears v. Terry*, 26 Conn. 273; *Dorman v. Ogbourne*, 16 Ala. 759; *Munson v. Munson*, 9 Tex. 109; *Lacy v. Williams*, 27 Mo. 280; *Herring v. Goodson*, 43 Miss. 392; *Duke v. State*, 57 Miss. 229; see *Title Parent and Child*.

² *Boyd v. Glass*, 34 Ga. 253; 89 Am. Dec. 252. The New York surrogate cannot appoint a guardian for a minor living in another state: *In re Hosford*, 2 Redf. 168. The supreme court cannot appoint a guardian for an infant not within the jurisdiction or domiciled there, and having no property therein; nor will the bringing of the infant into the state by stratagem, for the purpose of giving jurisdiction, avail: *In re Hubbard*, 82 N. Y. 90. A probate court cannot appoint a guardian over minors residing in another state: *Boyd v. Glass*, 34 Ga. 253; 89 Am. Dec. 252. A county court in

Kentucky has no power to appoint a guardian for an infant not domiciled in its county: *Ware v. Coleman*, 6 J. J. Marsh. 198; *Succession of Shaw*, 13 La. Ann. 265; *Brown v. Lynch*, 2 Bradf. 214; *Munson v. Newson*, 9 Tex. 109.

³ Schouler on Domestic Relations, 303; *Kraft v. Wickey*, 4 Gill & J. 332; 23 Am. Dec. 569.

⁴ Schouler on Domestic Relations, 303.

⁵ *Kraft v. Wickey*, 4 Gill & J. 332; 23 Am. Dec. 569.

⁶ Schouler on Domestic Relations, 303. The county court, in Texas, may appoint a guardian for a minor residing out of the state who has property in the county: *Neal v. Bartleson*, 65 Tex. 478. If minors have real estate in Indiana, a guardian may be appointed for them in the county where the real estate lies, though the minors may be non-residents: *Maxwell v. Campbell*, 45 Ind. 361.

common law local to the jurisdiction in which they are granted; and a foreign guardian cannot, by virtue of his letters granted by the proper court in another state, where he and his ward are domiciled, claim as a legal right to recover money belonging to the ward in the hands of a guardian of the estate of such ward resident in another state. But the court of common pleas in the latter state, possessing general chancery jurisdiction in such cases, and having jurisdiction over the resident guardian and the funds in his hands belonging to the ward, has power to order that such funds be transmitted or paid over to the guardian in such other state where the ward is domiciled.¹ Pending an application for the guardianship of infants in the county where their father had lived and died, the jurisdiction of the ordinary will not be divested by the grant of letters in another state, to which the sister of the infants has removed them.²

ILLUSTRATIONS.—A guardian had been appointed to a minor in the county of New York, and had sent the ward to reside in the county of Kings. *Held*, that on the arrival of the ward at fourteen years of age, and her desire to change her guardian, the surrogate of Kings County had jurisdiction to make the new appointment: *Ex parte Bartlett*, 4 Bradf. 221. A father residing in Morgan County dies there, leaving minor children; soon afterwards, the mother dies, leaving the minors in the same county. The grandfather, residing in Jasper County, took the minors to his home to reside with him. *Held*, that the ordinary of Jasper County, and he only, had jurisdiction to appoint a guardian over the minors: *Darden v. Wyatt*, 15 Ga. 414. A guardian of minors received property of his wards in a foreign country. He took it to the state where the wards resided, and where he had been appointed guardian, and mingled it with his business funds. *Held*, that he must account to the probate court in the state where he was appointed guardian for the property from abroad, unless he could show that he had accounted in the foreign country in which he received it: *Sechi's Estate*, Myrick's Probate, 225.

§ 853. Who may be Appointed Guardians—In General.

—The court is allowed a liberal discretion in selecting

¹ *Earl v. Dresser*, 30 Ind. 11; 95 ² *Shorter v. Williams*, 74 Ga. 539.
Am. Dec. 660. .

the proper person, and its decision will not ordinarily be disturbed on appeal.¹ The appointment of a guardian or administrator is void where the same has been exercised previously, and the party so appointed has not been removed nor the office declared vacant.² But where one having a prior right to letters of guardianship procures the appointment of another, he is concluded from afterwards claiming letters himself.³

ILLUSTRATIONS.—A was appointed guardian of B by a county court of which, at the time of his appointment, he was an acting justice. *Held*, that the fact that he was so acting did not render nugatory his appointment, so as to discharge C, a surety on the guardian bond, from liability to the ward: *State v. Lewis*, 73 N. C. 138.

§ 854. Parents of Child—Relatives.—The father has usually the first right to be appointed the guardian of his infant child or children.⁴ In some of the states, by statute, probate guardians are appointed solely to take charge of the child's estate, the father's right over his person remaining undisturbed.⁵ In other states, again, the probate courts can only grant guardianship in the case of fatherless children.⁶ After the father the mother, and after the mother the next of kin, of the infant are entitled to guardianship.⁷ Where the application for the guardianship of infants is made by their maternal grandmother, and the petition does not disclose the fact that the paternal grandfather is at the time living in the county, and letters are issued to

¹ *White v. Pomeroy*, 7 Barb. 640; *Battle v. Dick*, 4 Dev. 294; *Nelson v. Green*, 22 Ark. 367.

² *Thomas v. Burrus*, 23 Miss. 550; 57 Am. Dec. 155.

³ *Kahn v. Israelson*, 62 Tex. 221.

⁴ *Schouler on Domestic Relations*, 304.

⁵ *Schouler on Domestic Relations*, 304; *Clark v. Montgomery*, 23 Barb. 464.

⁶ *Poston v. Young*, 7 J. J. Marsh. 501; *Hall v. Lay*, 2 Ala. 529.

⁷ "And such claim," it is said in *Al-*

bert v. Perry, 14 N. J. Eq. 542, "cannot be disregarded, unless for some satisfactory reason apparent to the court": *Eldridge v. Lippincott*, 1 N. J. L. 397; *Read v. Drake*, 2 N. J. Eq. 78; *Allen v. Peete*, 25 Miss. 29; *Moorehouse v. Cook*, Hopk. Ch. 226; *Lord v. Hough*, 37 Cal. 657; *Johnson v. Kelly*, 44 Ga. 485. Under the Texas statutes, the guardianship is not to be given to one who is not of the kindred of the orphan, rather than to the presumptive heir: *Good v. Good*, 52 Tex. 1.

the petitioner without notice to the grandfather, such letters will be revoked upon the application of the latter, and an opportunity afforded him to be heard in the matter.¹

ILLUSTRATIONS.—A day or two before his death, a father told his wife to keep his child, the step-daughter of the wife, and nine years old. *Held*, that neither the child nor its step-mother having property, the latter would be appointed the child's guardian in preference to the aunt of the father, who had property: *In re De Marcellin*, 24 Hun, 207; 4 Redf. 299. A mother was appointed a guardian of her child, but failed to give the bond within the time limited by the court, and the court, without notice, appointed a stranger in her stead. *Held*, that the appointment of the latter was not warranted: *Weldon v. Keen*, 37 N. J. Eq. 251.

§ 855. Married Women—Non-residents.—As a rule, a married woman will not be appointed a guardian,² but in some states the statutes render a married woman competent.³ By the marriage of a woman who is the guardian of her infant children, her husband becomes joined with her in the guardianship.⁴ The husband of a guardian, by virtue of his wife's appointment, may exercise the powers of a guardian. If he invests the ward's money in land, he becomes a volunteer, and if the ward elects to proceed against the land, he occupies no better position than would the guardian, had she taken the title to herself.⁵ In some of the states, the appointment of non-residents is prohibited by statute, and even without such prohibition, the court will generally withhold letters of guardianship where the petitioner is beyond the reach of state process.⁶ And the removal of the guardian outside the jurisdiction of the court is a good reason for revoking the appointment.⁷

¹ *In re Feely*, 4 Redf. 306.

² Schouler on Domestic Relations, 306.

³ Schouler on Husband and Wife, appendix; *Palmer v. Oakley*, 2 Doug. (Mich.) 433; 47 Am. Dec. 41; holding that the appointment of a married woman, with the assent of her husband, is valid.

⁴ *Martin v. Foster*, 38 Ala. 688.

⁵ *Wood v. Stafford*, 50 Miss. 370.

⁶ *Finney v. State*, 9 Mo. 227; *In re Taylor*, 3 Redf. 259; *Hanbest's Estate*, 11 Phila. 63.

⁷ *Eiland v. Chandler*, 8 Ala. 781; *Cockrell v. Cockrell*, 36 Ala. 673; *Speight v. Knight*, 11 Ala. 461; *Nettleton v. State*, 13 Ind. 159; *Cook v. Beale*, 11 Ired. 36.

§ 856. **Mode of Appointment of Probate Guardians.** — The American practice on the appointment of probate guardians is very simple. "Petition is presented by the person desiring the appointment, whereupon a citation is issued for all parties interested to appear on a certain court day. The judge, upon the day specified, after a summary hearing, appoints the guardian and issues letters of guardianship upon filing bond with proper security. Appeal may be taken within a limited time by any person aggrieved, and the tribunal of last resort then hears the parties, determines the choice, and makes a final decree, to which the lower court conforms, and issues letters of guardianship accordingly. The infant, if under fourteen, is rarely produced in court, nor does the judge make an order of reference."¹ The statutory mode must be followed, or the appointment and all acts done under it are void.² The requirement that before any one shall be appointed guardian he shall file a statement of the ward's estate is directory only, and a failure will not render an appointment void.³ A letter of guardianship is in the nature of a certificate of commission, and in the absence of any statutory provision requiring it, it is not essential to its validity as evidence of the appointment that it should recite the mode and particulars of the nomination, and all reasonable presumptions must be indulged in favor of its having emanated regularly and from lawful proceedings.⁴ As soon as a guardian duly appointed has given bond, the appointment is consummated, and cannot be revoked without notice to the guardian.⁵

§ 857. **Effect of Appointment — Conclusiveness of Decree.** — The letters of guardianship cannot be collaterally attacked except for fraud or want of jurisdiction in the

¹ Schouler on Domestic Relations, 307.

² *Seaverns v. Gerke*, 3 Saw. 353; *Badenhoof v. Johnson*, 11 Nev. 87; *Royston's Appeal*, 53 Wis. 612.

³ *Lee v. Ice*, 22 Ind. 384.

⁴ *Burrows v. Bailey*, 34 Mich. 64.

⁵ *Isaacs v. Taylor*, 3 Dana, 600.

court issuing them.¹ If otherwise improperly issued, application to have them revoked must be made to the court which issued them.²

§ 858. **Termination of Guardianship—Effluxion of Time.**—The guardianship ceases when the ward becomes of age.³ His powers, authority, and duties as guardian come to an end, but the consequences and responsibilities of the relation continue.⁴ So if appointed for a certain period less than that, his authority ceases when that event comes about.⁵ The power of the testamentary guardian continues until the child is of age, unless sooner terminated by the instrument appointing him.⁶

§ 859. **Death of Ward.**—The ward's death terminates the guardianship.⁷ Thereafter the guardian's only duty is to settle up the accounts and pay the balance in his hands to his ward's personal representatives, whereupon his trust is completely fulfilled.⁸ In some states the guardian becomes the administrator of his deceased ward.⁹

§ 860. **Marriage of Ward.**—As to a male ward, it does not appear that his marriage would put an end to the guardianship in every case; certainly not as far as his

¹ Schouler on Domestic Relations, 308; *Fridge v. State*, 3 Gill & J. 103; 20 Am. Dec. 463; *Palmer v. Oakley*, 2 Doug. (Mich.) 433; 47 Am. Dec. 41.

² *Mathews v. Wade*, 2 W. Va. 464; *Warner v. Wilson*, 4 Cal. 310; *Speight v. Knight*, 11 Ala. 461; *Kimball v. Fisk*, 39 N. H. 110; 75 Am. Dec. 213.

³ *Jones v. Ward*, 10 Yerg. 160; *In re Nicoll*, 1 Johns. Ch. 25; *Maxsom v. Sawyer*, 12 Ohio, 196; *Mauro v. Ritchie*, 3 Cranch C. C. 147; *Overton v. Beavers*, 19 Ark. 623; 70 Am. Dec. 610; *May v. Webb*, Kirby, 286; *In re Dyer*, 5 Paige, 534; *Bourne v. Maybin*, 3 Woods, 724.

⁴ *Overton v. Beavers*, 19 Ark. 623; 70 Am. Dec. 610. In Ohio, the guardianship of a minor female expires by

operation of law when the ward arrives at the age of twelve years, whether another guardian on her nomination is appointed or not or any action taken in the matter; and all power of the guardian over the ward or her estate ceases at that time: *Perry v. Brainard*, 11 Ohio, 442.

⁵ *Holmes v. Field*, 12 Ill. 424; *Corrigan v. Kienan*, 1 Bradf. 208; *Kimball v. Fisk*, 39 N. H. 110; 75 Am. Dec. 213; *Hovey v. Harmon*, 49 Me. 269.

⁶ *Ex parte Reynolds*, 11 Hun, 41.

⁷ Schouler on Domestic Relations, 312; *Norton v. Strong*, 1 Conn. 65.

⁸ Schouler on Domestic Relations, 312.

⁹ *Beavers v. Brewster*, 62 Ga. 574.

estate is concerned;¹ but the power of a guardian ceases on the marriage of a female ward.² In New York it has been held that the power does not cease *ipso facto*, but that the husband is entitled on his motion to an order of court transferring the property of the ward to him.³

§ 861. Death of Guardian.—The death of the guardian terminates the relation;⁴ but the ward does not become free; for a successor steps in. "This successor is the person next indicated in the will appointing testamentary guardians, or the survivor of joint guardians, or some one appointed in chancery or probate to fill the vacancy, as the case may be."⁵

§ 862. Resignation of Guardian.—The common law was averse to allowing a guardian to resign his trust, so were and still are courts of equity. But by statute in many of the states, probate guardians may, in the discretion of the court, be allowed to resign.⁶ Granting an order permitting a guardian to resign is no judgment that a full settlement and accounting has been had.⁷ The agreement of a party to resign as guardian that another may be appointed in his place, and so get control of the personal estate of the ward, in consideration of which the latter party agrees that he will give to the ward a child's part of the estate, is against public policy.⁸

ILLUSTRATIONS.—A statute allowed the court to remove guardians for "good and sufficient cause." Held, that the resignation of the guardian was within these words: *Young v. Lorain*, 11 Ill. 624; 52 Am. Dec. 463.

¹ *Brick's Estate*, 15 Abb. Pr. 12; and see *In re Herbeck*, 16 Abb. Pr., N. S., 214.

Jones v. Ward, 10 Yerg. 160; *Shutt v. Carlos*, 1 Ired. Eq. 232; *Armstrong v. Walkup*, 12 Gratt. 608; *Nicholson v. Wilbur*, 13 Ga. 467.

² *Porch v. Fries*, 18 N. J. Eq. 204; *Bartlett v. Cowles*, 15 Gray, 445; *Burr v. Wilson*, 18 Tex. 367; *State v. Joest*, 46 Ind. 235; *Kidwell v. State*, 45 Ind. 27.

³ *Whitaker's Case*, 4 Johns. Ch. 378; *Ex parte Crumb*, 2 Johns. Ch. 439.

⁴ *King v. Hughes*, 52 Ga. 600.

⁵ *Cunningham v. Cunningham*, 18 B. Mon. 19; 68 Am. Dec. 718.

⁶ *Schouler on Domestic Relations*, 314.

⁷ *Schouler on Domestic Relations*, 314; *Armstrong v. Walkup*, 12 Gratt. 608.

§ 863. **Removal of Guardian for Cause.**—The court of chancery may remove all guardians, whether appointed by probate tribunals or by the court itself, or by testament, or by the legislature, whenever the guardian abuses his trust, or the interests of the ward require it.¹ A large discretion is necessarily left to the courts having original jurisdiction of removing guardians for a breach of their duties, and their decision will not be interfered with, unless their discretion has been grossly abused.² In like manner probate courts have power to remove guardians of their own appointment on good and sufficient cause;³ and they have likewise, by statute, the same power over testamentary guardians.⁴ The removal can only be after cause shown.⁵ It will not be done on the motion of a mere stranger; only at the instance of a party in interest.⁶ As the county court, under the Texas statute, may remove a guardian of its own motion, its order of removal is not invalid because based on a defective petition.⁷

§ 864. **What is and What is not "Good Cause" for Removal.**—The following have been held to be "good cause" for removing the guardian, viz.: Abandoning the trust;⁸ appointment without notice to all parties interested;⁹ conduct of a guardian tending to alienate the affection of his

¹ Schouler on Domestic Relations, 316; Cowls v. Cowls, 3 Gilm. 435; Damarell v. Walker, 2 Redf. 198; Simpson v. Gonzales, 15 Fla. 9; McPhillips v. McPhillips, 9 R. I. 536; In re Clement, 25 N. J. Eq. 508; Disbrow v. Henshaw, 8 Cow. 349; In re Andrews, 1 Johns. Ch. 100; Ex parte Crumb, 2 Johns. Ch. 439; Lord v. Hough, 37 Cal. 663; In re King, 42 Hun, 607.

² Young v. Young, 5 Ind. 513; Nicholson's Appeal, 20 Pa. St. 50.

³ In re Clement, 25 N. J. Eq. 508; McPhillips v. McPhillips, 9 R. I. 536. Where the statute enumerates the grounds on which guardians may be removed, a removal on grounds not enumerated is not authorized: Kahn v. Israelson, 62 Tex. 221.

⁴ McPhillips v. McPhillips, 9 R. I. 536; Copp v. Copp, 20 N. H. 264; Marsangale v. Tate, 4 Hayw. 31. A testamentary guardian ought not to be removed without a showing of such waste, insolvency, or misconduct that the ward will be unable to recover the balance due on the final settlement: Sanderson v. Sanderson, 79 N. C. 369.

⁵ Whitney v. Whitney, 7 Smedes & M. 740; Mauro v. Ritchie, 3 Cranch C. C. 147; Sanderson v. Sanderson, 79 N. C. 369; Lord v. Hough, 37 Cal. 664; Copp v. Copp, 20 N. H. 284.

⁶ Cotton v. Goodson, 1 How. (Miss.) 295.

⁷ Cherry v. Wallis, 65 Tex. 442.

⁸ Lefever v. Lefever, 6 Md. 472.

⁹ Moorehouse v. Cooke, Hopk. 226; Ramsay v. Ramsay, 20 Wis. 507.

infant ward from its mother, who is a person of good character;¹ failure to file inventory or accounts when ordered;² failure to support the ward;³ fraud or false representations in obtaining the appointment;⁴ having interests which are liable to conflict with those of the ward;⁵ insanity of the guardian;⁶ insolvency of the guardian and his sureties;⁷ intoxication gross and confirmed;⁸ misconduct in office;⁹ removing from the jurisdiction;¹⁰ resigning his office;¹¹ using the ward's money for the guardian's profit;¹² wasting the estate of the ward.¹³

ILLUSTRATIONS.—A guardian of an insane person allowed his ward to go to another state, and did not see her for ten years, and made no provision for her, and her estate while in his hands decreased from three thousand two hundred to two thousand four hundred dollars. *Held*, that there was ground for his removal: *Watt v. Allgood*, 62 Miss. 38. A husband and his wife were guardians of two infants. The husband was addicted to intemperance, which caused frequent fits of insanity. *Held*, that both husband and wife must be removed from the guardianship: *Kettletas v. Gardner*, 1 Paige, 488. A guardian removed by one county court for cause obtained appointment in another county by concealing the above fact, and by inducing interested parties to sign his application without knowing what it was. *Held*, that as the guardian had not dealt with innocent third parties under his second appointment, that court could

¹ *Perkins v. Finnegan*, 105 Mass. 501.

² *Kimmel v. Kimmel*, 48 Ind. 203; *Dickerson v. Dickerson*, 31 N. J. Eq. 652. A guardian will not be removed for failure to file an inventory within three months from his appointment, if no personality had come to his hands, or rents from the realty which had been leased under order of the court: *Johnson v. Metzger*, 95 Ind. 307.

³ *In re Swift*, 47 Cal. 629.

⁴ *In re Clements*, 25 N. J. Eq. 506; *Tong v. Marvin*, 26 Mich. 35. Under the laws of Pennsylvania, which forbid the appointment of a guardian whose religious faith differs from that of his parents, the appointment of such a guardian secured by *suppression* *veri* will be set aside: *In re Pratt*, 1 Pa. Leg. Gaz. 56.

⁵ *Senseman's Appeal*, 21 Pa. St. 333.

⁶ *Schouler on Domestic Relations*, 317; citing *Modawell v. Holmes*, 40 Ala. 391; *Damarell v. Walker*, 2 Redf. 198.

⁷ *In re Cooper*, 2 Paige, 34.

⁸ *Kettletas v. Gardner*, 1 Paige, 488.

⁹ *Barnes v. Powers*, 12 Ind. 341; *O'Neil's Case*, 1 Tuck. 34; *Sweet v. Sweet*, Spears Eq. 309.

¹⁰ *Nettleton v. State*, 13 Ind. 159; *Cockrell v. Cockrell*, 36 Ala. 673; *State v. Engelke*, 6 Mo. App. 356; *In re Bookler*, 18 La. Ann. 577; *Cook v. Beale*, 11 Ired. 36; *Moses v. Eaber*, 81 Ala. 445.

¹¹ *Young v. Swain*, 11 Ill. 624; 52 Am. Dec. 463; *Brown v. Huntsman*, 32 Minn. 466.

¹² *Snavely v. Harkrader*, 29 Gratt. 112.

¹³ *Dickerson v. Dickerson*, 31 N. J. Eq. 652; *Nicholson's Appeal*, 20 Pa. St. 50.

declare its proceedings in the case void *ab initio*, on petition of the wards: *Pease v. Roberts*, 16 Ill. App. 634.

§ 865. **Extent of Title and Authority of Guardian — Person and Estate.** — A guardian in socage and a testamentary guardian under the statute are guardians both of the person and the estate of the ward;¹ and in the case of probate guardianship in this country, one appointed guardian has control both of the person and the property of the ward.²

§ 866. **Joint Guardians.** — Where one of two or more guardians dies or is removed, the other or others continue the trust.³ Where two or more are appointed, and one declines to act, all the powers of the whole number devolve on those who accept.⁴ One guardian may be appointed for several wards jointly, and a joint bond may be given for their security, where the wards hold by common title and as tenants in common.⁵ Where two are appointed jointly, one may qualify without the other, and without calling on the other to accept or renounce the trust.⁶ Where one guardian consents to his co-guardian's misapplication of funds, he is liable;⁷ but one guardian is not liable for the defaults of another, except in the case of gross negligence on his part in failing to superintend his conduct and acts.⁸ Where joint guardians apportion the duties of their trust between them according to the peculiar qualifications of each, and one allows the other, who appeared to be in affluent circumstances, to take charge of all the money of the estate, he will be liable to

¹ *Palmer v. Oakley*, 2 Dong. (Mich.) 433; 47 Am. Dec. 41; *Byrne v. Van Hoesen*, 5 Johns. 66.

² *Ten Brook v. McColm*, 12 N.J.L. 97.

³ *People v. Byron*, 3 Johns. Cas. 53; *Pepper v. Stone*, 10 Vt. 427; *Kirby v. Turner*, Hopk. Ch. 309.

⁴ *Kevan v. Waller*, 11 Leigh, 414; 36 Am. Dec. 391; *In re Reynolds*, 11 Hun, 14.

⁵ *Pursley v. Hayes*, 22 Iowa, 11; 92 Am. Dec. 350.

⁶ *Kevan v. Waller*, 11 Leigh, 414; 36 Am. Dec. 391; *In re Reynolds*, 11 Hun, 41.

⁷ *Pim v. Downing*, 11 Serg. & R. 66.

⁸ *Jones's Appeal*, 8 Watts & S. 143. 42 Am. Dec. 282.

account only for the property that came to his own hands, but not for losses occasioned by the insolvency of his colleague, if he acts with reasonable diligence and good faith.¹ The survivor of joint guardians will be presumed to have received the whole estate, in the absence of proof that the other guardian received and retained any portion thereof.² The failure of a guardian to keep his accounts with several wards separate and distinct will not invalidate a title under a sale made by him.³

ILLUSTRATIONS. — There being two guardians of minor wards, one having assets in his hands delivered them to his co-guardian, and took his receipt. Afterwards he joined with his co-guardian in settling an account, and the latter subsequently became insolvent. *Held*, that the former continued liable: *Clark's Appeal*, 18 Pa. St. 175.

§ 867. **Guardian Who is also Executor.**—Where the same person is both guardian and executor, it is his duty to keep the two trusts distinct and separate.⁴ Where the same person is administrator and guardian of the heir, the balance upon final settlement shall be considered as in the hands of the guardian.⁵ Where an executor is appointed guardian of heirs to whom a debt from the estate is due, the latter cannot maintain any suit to compel the executor to pay it over, as the obligation of paying and the duty of receiving are in the same person; but as no suit can be brought, the law will, *eo instanti* the money becomes payable, transfer it from one character to the other.⁶ An administrator who is also the guardian of an infant heir, and who as administrator attempts to divest the title of the heir by a sale of the decedent's land for

¹ Jones's Appeal, 8 Watts & S. 143; 42 Am. Dec. 282.

² Graham v. Davidson, 2 Dev. & B. Eq. 155.

³ Puralley v. Hayes, 22 Iowa, 11; 92 Am. Dec. 350.

⁴ Wilson v. Wilson, 17 Ohio St. 150; 91 Am. Dec. 125; Burton v. Tunnell, 4 Harr. (Del.) 424; Townsend v. Tal-

lant, 33 Cal. 45; 91 Am. Dec. 617. An executor, as such, has no rights as guardian: Boyd v. Glass, 34 Ga. 253; 89 Am. Dec. 252.

⁵ Seegar v. State, 6 Har. & J. 162; 14 Am. Dec. 265.

⁶ State v. Hearst, 12 Mo. 385; 51 Am. Dec. 167.

the payment of debts, occupies *quoad* the petition a position hostile to the heir, and a guardian *ad litem* must be appointed.¹

§ 868. **Quasi Guardians—Liabilities of.**—A *quasi* guardian is described as one who takes hold of the ward's affairs without an appointment,² or where the appointment was without jurisdiction in the court making it,³ or who holds on after his authority has legally ceased by the ward's coming of age, or the like.⁴ Such a person will be held liable as a trustee.⁵

§ 869. **Rights of Guardian—To Custody of Ward.**—The appointment of a guardian by the court is a final decision upon his right to the care and control of his person.⁶ He may take the child from his relatives, to whom he has been committed by his father.⁷ So the guardian has the right to remove an improper person for his ward to associate with from the ward's premises, using no more force, and removing such person no farther, than is necessary to prevent a renewal of such association.⁸

§ 870. **To Change Ward's Domicile or Residence.**—A parent has a right to change his child's residence as he pleases,⁹ but a guardian not the parent of the ward has no such right, unless the change is necessary for purposes

¹ Townsend v. Tallant, 33 Cal. 45; 91 Am. Dec. 617.

² Pennington v. Fowler, 7 N. J. Eq. 346.

³ Earle v. Crum, 42 Miss. 165.

⁴ Mellish v. Mellish, 1 Sim. & St. 138; Armstrong v. Walkup, 12 Gratt. 608.

⁵ Magruder v. Darnell, 6 Gill, 269; Espey v. Lake, 15 Eq. L. & Eq. 579; Pennington v. Fowler, 7 N. J. Eq. 346; Houseal v. Gibbes, 1 Bail. Eq. 482; 23 Am. Dec. 186; Davis v. Harkness, 1 Gilm. 173; 41 Am. Dec. 184; Chaney v. Smallwood, 1 Gill, 367. An ex-

ecutor or administrator who is in rightful possession of an infant's property is not a *quasi* guardian, for he holds in a different capacity: Bibb v. McKinley, 9 Port. 636; Munfie v. Ball, 7 Ark. 500.

⁶ Senseman's Appeal, 21 Pa. St. 331.

⁷ Coltman v. Hill, 31 Me. 196; Johns v. Emmert, 62 Ind. 533.

⁸ Wood v. Gale, 10 N. H. 247; 34 Am. Dec. 150.

⁹ Pottinger v. Wightman, 3 Mer. 67; Wood v. Wood, 5 Paige, 596; 28 Am. Dec. 451; Schwartz v. Hazlett, 8 Cal. 123.

of education, or the like.¹ A guardian has no authority to require his ward to reside with him out of the jurisdiction, without permission from the court,² but he may change the residence of his ward from one county to another within the same state,³ and even, it has been held, from one state to another if for the ward's benefit; and this, though the death of the ward in his new domicile will change the succession of the estate; but the least suspicion of fraud in such case will be carefully scrutinized.⁴ In one case, a guardian being about to remove from the state with her wards was required to give bond for the return of one of them for the purpose of receiving his education in the state of her appointment, and to return both of the wards whenever required to do so by order of the chancery court.⁵ When a guardian removes his ward to his own residence, in a different county from that in which the ward's parents lived and died, this does not change the ward's domicile; and if the guardian dies while the child is still under fourteen years of age, his successor should be appointed by the probate court of the latter county.⁶

§ 871. To Services of Ward — To Recover for Injuries.—The guardian has not the father's right to the services of the ward.⁷ But he may recover damages for injury to the ward.⁸

§ 872. Powers and Duties of Guardian—In General—Management of Ward's Estate.—In the management of

¹ *School Directors v. James*, 2 Watts & S. 568; 37 Am. Dec. 525; *Daniel v. Hill*, 52 Ala. 430; *Wynn v. Bryce*, 59 Ga. 529; *Ex parte Martin*, 2 Hill Eq. 71; *Wood v. Wood*, 5 Paige, 596; 28 Am. Dec. 451; *Ex parte Bartlett*, 4 Bradf. 224; *Hiestand v. Kuns*, 8 Blackf. 345; 46 Am. Dec. 481.

² *Fulton's Estate*, 14 Phila. 298.

³ *In re Bartlett*, 4 Bradf. 221.

⁴ *Townsend v. Kendall*, 4 Minn. 412; 77 Am. Dec. 534.

⁵ *In re Martin*, 2 Hill Ch. 71.

⁶ *Marheineke v. Grothaus*, 72 Mo. 204.

⁷ *Schouler on Domestic Relations*, 335.

⁸ As for her seduction: *Fernsler v. Moyer*, 3 Watts & S. 416; 39 Am. Dec. 33; *Palmer v. Oakley*, 2 Doug. (Mich.) 433; 47 Am. Dec. 41. *Contra*, *Blanchard v. Isley*, 120 Mass. 487; 21 Am. Rep. 535.

the ward's estate, the guardian must exercise the prudence and foresight which a good business man would use in the management of his own affairs. Mr. Schouler says: "Among the most obvious powers and duties of the guardian in the management of his ward's property are these: To collect all dues and give receipts for the same; to procure such legacies and distributive shares from testators or others as may have accrued; to take and hold all property settled upon the ward by way of gift or purchase, unless some trustee is interposed; to collect dividends and interest, and the income of personal property in general; to receive and receipt for the rents and profits of real estate; to receive money due the ward on bond and mortgage; to pay the necessary expenses of the ward's personal protection, education, and support; to invest and reinvest all balances in his hands; to sell the capital of the ward's property, change the character of investments when needful, convert real into personal and personal into real estate in a suitable exigency, but not without judicial direction; to account to the ward or his legal representatives at the expiration of his trust."¹ The act of a guardian will be sustained if beneficial to his ward, though unauthorized by his guardianship.²

The following have been held to be among the general powers and duties of a guardian, viz.: To accept delivery of a deed to the ward;³ to grant an easement in the ward's land;⁴ to employ counsel in disputes concerning the ward's property, and also, in proper cases, to employ

¹ Schouler on Domestic Relations, 342. Guardians must collect claims or debts due their wards, recover property to which they have claim or title, and account to them for all rents, profits, or revenues which are or may become due to their estates. If there is a surplus of money not applied to the support, maintenance, and education of the wards, it must be put at interest

upon mortgages on land, or retained in their hands under approval of court: *Smith v. Dibrell*, 31 Tex. 239; 98 Am. Dec. 526.

² *Capehart v. Huey*, 1 Hill (S. C.) Ch. 405.

³ *Barney v. Seeley*, 38 Wis. 381.

⁴ *Watkins v. Peck*, 13 N. H. 360; 40 Am. Dec. 156; *Johnson v. Carter*, 16 Mass. 443.

and pay agents to look after the property;¹ to invest the moneys of his ward without an order of court, but at his own risk, as a general rule;² to lease his ward's lands, but not beyond his minority;³ to permit a person to raise crops on the ward's land on shares;⁴ to purchase personal property for the ward;⁵ to redeem the estate from foreclosure;⁶ to represent the ward in partition proceedings, and appeal in his behalf;⁷ to resist a claim to dower preferred by the widow in a court of doubtful jurisdiction, and his expenses of such defense should be allowed him on a settlement of his accounts;⁸ to sell the ward's personalty;⁹ to sell and transfer promissory notes taken by him;¹⁰ to spend money in his hands on improvements;¹¹ to transfer a note for the ward's money to a third person for collection.¹² Where a testator appoints a person permanently residing in another state guardian for his children, it will be inferred that he expected the guardian would remove the children to that state; and the expense of removing the children will be a proper charge against the estate.¹³

And the following have been held to be not within the guardian's general powers, viz.: To apply property exempt

¹ *In re Flinn*, 31 N. J. Eq. 640; *Ramsay v. Joyce*, 1 McMull. Eq. 236; 37 Am. Dec. 550.

² *In re Cardwell*, 55 Cal. 137. When a guardian uses his ward's money in his business, the ward may take either interest or profits earned. He may take profits caused by his capital, not those caused by skill and labor in conducting the business: *Seguin's Appeal*, 103 Pa. St. 139.

³ *Van Doren v. Everitt*, 5 N. J. L. 460; 8 Am. Dec. 615; *Snook v. Sutton*, 10 N. J. L. 133; *Richardson v. Richardson*, 49 Mo. 29; *Emerson v. Spicer*, 46 N. Y. 594; *Muller v. Bermer*, 69 Ill. 108. Where a statutory method is prescribed, it must be followed, or the lease is invalid: *Webster v. Conley*, 46 Ill. 13; 92 Am. Dec. 234.

⁴ *Weldon v. Lytle*, 53 Mich. 1.

⁵ *Tenney v. Evans*, 14 N. H. 343; 40 Am. Dec. 194.

⁶ *Botham v. McIntier*, 19 Pick. 346; *Marvin v. Schilling*, 12 Mich. 356.

⁷ *Miller v. Smith*, 98 Ind. 226.

⁸ *McNickle v. Henry*, 4 Brewst. 150.

⁹ *Field v. Schieffelin*, 7 Johna. Ch. 150; 11 Am. Dec. 441; *Thompson v. Boardman*, 1 Vt. 367; 18 Am. Dec. 684; *Hunter v. Lawrence*, 11 Gratt. 111; 62 Am. Dec. 640; *Wallace v. Holmes*, 9 Blatchf. 65; *Humphrey v. Buisson*, 19 Minn. 221; *Woodward v. Donally*, 27 Ala. 198.

¹⁰ The legal title to promissory notes taken by a guardian is in such guardian, and he has the right to sell and transfer the same; and a purchaser in good faith, for valuable consideration, gets an absolutely good title to the paper: *Fountain v. Anderson*, 33 Ga. 372.

¹¹ *Robinson v. Hersey*, 60 Me. 225.

¹² *Fletcher v. Fletcher*, 25 Vt. 98.

¹³ *Cummins v. Cummins*, 29 Ill. 452.

from execution in satisfaction of the ward's debts;¹ to avoid a contract made by a ward which is for the ward's benefit;² to continue the business of an insane ward, so as to charge him with losses;³ to execute marriage articles between an infant ward and her intended husband, she not being a party;⁴ to give a part of the ward's lands to a railroad for a right of way;⁵ to loan the funds of his ward to private individuals without security; nor can the guardian become himself security on such a loan;⁶ to make a grant of an incorporeal hereditament out of the ward's land;⁷ to pledge his ward's notes;⁸ to purchase land with the ward's money without the order of court;⁹ to use the ward's money in his own business;¹⁰ to waive the homestead rights of the ward.¹¹ A guardian who acts as auctioneer in selling land of his ward, under license of court, is not authorized, as such, to sign for the purchaser a memorandum in writing, to take the sale out of the statute of frauds.¹²

ILLUSTRATIONS. — A will directed a partition and division of the estate, real and personal, to be made, but did not direct how it should be made. A partition by the authority of the executor, with the consent of the guardians of an infant, *held*, to be void as against the infant: *Jones v. Massey*, 9 S. C. 376. On settlement of an estate, a balance being found due the executor after the personalty was exhausted, the parties in interest asked that the real estate be distributed subject to a lien upon each share for its proportion of the amount due the executor. One of the heirs was an infant. *Held*, that the infant's guardian could not consent to the creation of a lien on the minor's share: *Sweigert's Estate*, Myrick's Probate, 152. A guardian

¹ Fuller v. Wing, 17 Me. 222.

² Oliver v. Houdlet, 13 Mass. 237; 7 Am. Dec. 134.

³ Corcoran v. Allen, 11 R. I. 567.

⁴ Healy v. Rowan, 5 Gratt. 414; 52 Am. Dec. 94.

⁵ Indiana etc. R. R. Co. v. Brittingham, 98 Ind. 294.

⁶ Nance v. Nance, 1 S. C. 209; Allen v. Gaillard, 1 S. C. 279.

⁷ Watkins v. Peck, 13 N. H. 360; 40 Am. Dec. 156.

⁸ Hardy v. Citizens' Bank, 61 N. H. 34.

⁹ Schouler on Domestic Relations, 347. Where a guardian invests the personal property of his ward in real estate without authority, the ward, on becoming of age, may elect whether to receive the real estate or to receive the money and interest: *Eckford v. DeKay*, 8 Paige, 89; *Caplinger v. Stokes*, Meigs, 177.

¹⁰ State v. Sanders, 62 Ind. 562; 30 Am. Rep. 203.

¹¹ Ratcliff v. Davis, 64 Iowa, 467.

¹² Bent v. Cobb, 9 Gray, 397; 69 Am. Dec. 295.

sold his ward's bond and mortgage, the purchaser paying in part by applying a debt past due to him from the guardian personally. The guardian became insolvent, and failed to account, and his bond became worthless. There was no evidence of the proper application of the purchase-money. The purchaser knew of the trust. *Held*, that the purchaser got no legal title, and equity would not uphold the transfer under such circumstances: *McDuffie v. McIntyre*, 11 S. C. 551; 32 Am. Rep. 500. Shares in an insurance company belonged to an infant, but were issued to his guardian, under the name of "Augusta R. Josephi, guardian." She afterwards, in the same name, but without any order of the probate court, sold and assigned them. *Held*, that such sale was void, and that the purchaser could not require the company to recognize him as having any title to such stock: *De la Montagnie v. Union Ins. Co.*, 42 Cal. 290. A devised land to B, and directed C to take care of the land until B should come of age, though not to use in any other way than for the support of the family. *Held*, that neither C nor the guardian of B could make any contract for improving the land so as to charge B with the cost: *Findley v. Wilson*, 3 Litt. 390; 14 Am. Dec. 72. The guardian of an insane person who had been engaged in a manufacturing business continued to carry on the same, either at the request or with the concurrence of all parties interested in the ward's estate, the result of which was advantageous thereto. The business required storage-room, and the guardian erected a building for such purposes on land of the ward's wife. The probate court having disallowed a charge by him for the cost of such building, *held*, on appeal, that he was entitled to charge the estate a reasonable rent therefor: *Murphy v. Walker*, 131 Mass. 341. Three persons owned an improvement on land belonging to the United States. One of them died leaving children, of whom one of the surviving owners became guardian, receiving money in that capacity, which he loaned upon mortgage security, as required by law. Afterwards the two surviving owners of the improvement purchased the land from the government in their own right. Upon bill filed by the wards to have a trust declared in their favor in respect to such portion of the land as would be embraced in their father's interest in the improvement, *held*, to be no part of the guardian's duty to appropriate any portion of the wards' money towards the purchase of any of this land for them: *Attridge v. Billings*, 57 Ill. 489.

§ 873. **To Sue and Arbitrate.** — The guardian may institute suits to recover the ward's property,¹ even where

¹ In re Hynes, 105 N. Y. 560; Shep- Bean, 8 N. H. 15; Southwestern R. R. herd v. Evans, 9 Ind. 260; Smith v. Co. v. Chapman, 46 Ga. 557. Under

it has been fraudulently obtained from the ward before his appointment.¹ He may maintain an action against the executors of an estate, who hold property to which his wards are heirs, for a proper sum for the maintenance and education of his wards.² The general rule is, that the guardian must sue in the name of the ward,³ though in some cases he is allowed to sue in his own name.⁴ He may sue in his own name when he has the right of possession, or where the possession is injured; but where the matter lies in action, the suit must be in the name of the ward.⁵ In New York, a general guardian appointed by the surrogate can maintain an action in his own name to compel the payment of money due on a contract made by him with the defendant for the benefit of the ward.⁶ The guardian may compromise a claim of the ward,⁷ or he may compound and release it,⁸ or he may submit it to arbitration.⁹ Where, as by statute, a guardian is authorized to compromise claims, a compromise may be upheld, even though it involves charging the ward's estate with new liabilities.¹⁰ A guardian cannot charge his ward's

a statute requiring a guardian "to appear for and defend, or cause to be defended, all suits" against their wards, such appearance and answer is the same in effect as if he had been expressly appointed guardian *ad litem* by the court: *Rankin v. Kemp*, 21 Ohio St. 651. The appointment of the obligor in a bond as guardian of the infants to whom it has been conveyed by the obligee does not extinguish the debt: *Winborn v. Gorrell*, 3 Fred. Eq. 117; 40 Am. Dec. 456.

¹ *Somes v. Skinner*, 16 Mass. 348.

² *Miller v. Duy*, 36 Ind. 521.

³ *Schouler on Domestic Relations*, 343; *Sillings v. Bumgardner*, 9 Gratt. 273; *Vincent v. Starks*, 45 Wis. 548; *Carskadden v. McGhee*, 7 Watts & S. 140; *Hutchins v. Johnson*, 12 Conn. 376; *Dowd v. Wadsworth*, 2 Dev. 130; 18 Am. Dec. 567; *Longstreet v. Tilton*, 1 N. J. L. 38; *Fox v. Minor*, 32 Cal. 111; 91 Am. Dec. 566; *Hoare v. Harris*, 11 Ill. 24; *Anderson v. Watson*, 3 Met. (Ky.) 509; *Hutchins v.*

Dresser, 26 Me. 76; *Bradley v. Amidon*, 10 Paige, 235; *Beecher v. Crouse*, 19 Wend. 306; *Jennings v. Collins*, 99 Mass. 29; 96 Am. Dec. 687.

⁴ *Schouler on Domestic Relations*, 343; *Pond v. Curtiss*, 7 Wend. 45; *Beecher v. Crouse*, 19 Wend. 306; *Thomas v. Bennett*, 56 Barb. 197; *Fuqua v. Hunt*, 1 Ala. 197; 34 Am. Dec. 771.

⁵ *Sutherland v. Goff*, 5 Port. 508; *Fuqua v. Hunt*, 1 Ala. 197; 34 Am. Dec. 771; *Longmire v. Pilkington*, 37 Ala. 296.

⁶ *Thomas v. Bennett*, 56 Barb. 197.

⁷ *Schouler on Domestic Relations*, 343; *Hogg v. Avery*, 69 Iowa, 434.

⁸ *Torry v. Black*, 58 N. Y. 185.

⁹ *Weed v. Ellis*, 3 Caines, 253; *Weston v. Stewart*, 11 Ma. 326; *Strong v. Beroujon*, 18 Ala. 168; *Hutchins v. Johnson*, 12 Conn. 376; 30 Am. Dec. 622; *Goleman v. Turner*, 14 Smedes & M. 118.

¹⁰ *Smith v. Angell*, 14 R. I. 192.

estate with any counsel fees he may choose to pay; it must appear that the services were required, and the compensation such as is usual for such services.¹ He will not be allowed to charge the estate of his ward with any part of the expense of a controversy, on the settlement of his accounts, where such controversy was occasioned by his own fault.²

§ 874. **Sale of Minor's Real Estate.**—A guardian's sale of real estate belonging to his ward is not binding upon the minor,³ unless it is made according to the mode provided by the statutes of most of the states allowing the sale of minor's realty.⁴ A guardian has no authority to bring suits in relation to the real estate of his ward.⁵ Oil being a part of the realty, a guardian cannot lease the land of his ward for the purpose of its development, as this would, in effect, be the grant of a part of the *corpus* of the estate of his ward.⁶ A deed by a *feme* guardian of infants of the right of such infants in land does not convey the guardian's right of dower.⁷ Cutting trees on an infant's land by the guardian's permission is not trespass, and the ward cannot maintain an action therefor, even after the guardianship has terminated, but he must look to his guardian for compensation.⁸ A guardian will not be ordered to sell the real estate of a minor where the

¹ *Alexander v. Alexander*, 8 Ala. 796; *Taylor v. Kilgore*, 33 Ala. 214; *Neilson v. Cook*, 40 Ala. 498; *Smith v. Bean*, 8 N. H. 15; *Mathes v. Bennett*, 21 N. H. 204; *In re Dawson*, 3 Bradf. 130; *McGary v. Lamb*, 3 Tex. 342.

² *Blake v. Pegram*, 109 Mass. 541.

³ *Schouler on Domestic Relations*, 356; *Wells v. Chaffin*, 60 Ga. 677; *Morrison v. Kinstra*, 55 Miss. 71; *Antonidas v. Walling*, 4 N. J. Eq. 42; 31 Am. Dec. 248; *Rainey v. Chambers*, 56 Tex. 17.

⁴ *Schouler on Domestic Relations*, 260; *Boisseau v. Boisseau*, 79 Va. 73; 52 Am. Rep. 616. It is constitutional for the legislature to pass an act au-

thorizing a guardian to sell the real estate of his ward: *Ward v. New Eng. etc. Co.*, 1 Cliff. 565; *De Mill v. Lockwood*, 3 Blatchf. 56; *Mason v. Wait*, 5 Ill. 127; *McComb v. Gilkey*, 29 Miss. 146; *Boon v. Bowers*, 30 Miss. 246; 64 Am. Dec. 159; *Stewart v. Griffith*, 33 Mo. 13; 82 Am. Dec. 148; *Estep v. Hutchman*, 14 Serg. & R. 435; *Thurston v. Thurston*, 6 R. I. 296; *Jones v. Perry*, 10 Verg. 59; 30 Am. Dec. 430.

⁵ *Muller v. Benner*, 69 Ill. 108.

⁶ *Stoughton's Appeal*, 88 Pa. St. 198.

⁷ *Jones v. Hollopeter*, 10 Serg. & R. 326.

⁸ *Truss v. Old*, 6 Rand. 556; 18 Am. Dec. 748.

title is in doubt, as it might deter bidders and sacrifice the property.¹ A guardian acting under the order of the court has authority to lay out additions to cities and to dedicate lands to the public for streets and alleys.²

It may be premised that as to the legal estate of a ward in real property the courts have always refused to order its sale, except, perhaps, where there were debts to be paid. But in late years statutes have been passed in most of the states providing for the sale of the lands of a ward in the modes prescribed, viz.: An application to the court on the infant's behalf, upon which an order of sale issues; a special bond to be filed by the guardian; the formal sale of the land at public auction; the execution of the deed to the purchaser; a proper disposition of the proceeds; a confirmation of the sale by the court. In these statutory sales all these requisites must be followed,³ or else the sale may be afterwards set aside at the suit of the ward or his privies.⁴ On an application by a guardian for license to

¹ Moore's Estate, 9 Phila. 326.

² Indianapolis v. Kingsbury, 101 Ind. 200.

³ The verbal directions of a judge of probate will not protect a guardian, and are not receivable in evidence in defense of his action: Folger v. Heidel, 60 Mo. 284. A probate court may, under the laws of Arkansas, authorize a guardian to sell his ward's real estate at private sale: Fleming v. Johnson, 26 Ark. 421. In Virginia, a court of equity has not, under its general jurisdiction as guardian of infants, authority to sell their real estate whenever it is for their advantage to do so. Its jurisdiction to sell the real estate of infants on the ground of infancy merely is derived from the statutes: Faulkner v. Davis, 18 Gratt. 651; 98 Am. Dec. 698.

⁴ Failure to take the statutory oath: Cooper v. Sutherland, 3 Iowa, 114; 66 Am. Dec. 52. Failing to make report and of court to confirm sale: Penn v. Heisey, 19 Ill. 295; 68 Am. Dec. 597; People v. Judge, 19 Mich. 296. Having order made without notice to all parties: Moore v. Hood, 9 Rich. Eq.

311; 70 Am. Dec. 210. Giving defective notice of description of land to be sold: Frazier v. Steenrod, 7 Iowa, 339; 71 Am. Dec. 447. Sale not approved by the court: White v. Clauson, 79 Ind. 188. Not made at time required by law: Brown v. Christie, 27 Tex. 73; 84 Am. Dec. 607. In Illinois, the ward need not be made a party to a proceeding to sell his realty: Smith v. Race, 27 Ill. 387; 81 Am. Dec. 235; Fitzgibbon v. Lake, 29 Ill. 165; 81 Am. Dec. 302; and see Lloyd v. Malone, 23 Ill. 43; 74 Am. Dec. 179; Mattingly v. Read, 3 Met. (Ky.) 524; 79 Am. Dec. 565; Stewart v. Bailey, 28 Mich. 251; Lyon v. Vanatta, 35 Iowa, 521; Rankin v. Miller, 43 Iowa, 11; Kennedy v. Gaines, 51 Miss. 625; Gibson v. Roll, 27 Ill. 88; 81 Am. Dec. 219; Nichols v. Lee, 10 Mich. 526; 82 Am. Dec. 57. Error of the court in approving a bond given to the ward instead of the court does not invalidate the sale: Kelley v. Morrell, 29 Fed. Rep. 736. Mere irregularities do not affect it: Walker v. Goldsmith, 14 Or. 125.

sell the real estate of his wards, they need not be made parties to the proceedings, nor is the appointment of a guardian *ad litem* required.¹ Proceedings to sell real estate for the maintenance of the ward are purely *in rem*. No parties are necessary. It is *ex parte*, in the name of the guardian on behalf of the ward, after notice to all concerned.² A petition for the sale of real estate by a guardian or administrator, if defective in regard to the description of part of the land, is good for so much of the land as it correctly describes.³ Without a confirmatory order of the court, the deed of a guardian does not pass title.⁴ Although a guardian has no right to give a deed before his sale has been confirmed, if he does so, and the sale is then confirmed, the deed is good.⁵ A guardian's sale of land cannot after confirmation by the probate court be collaterally attacked as illegal, in an action for the land brought by one who in good faith derives title from the purchaser at such sale, because the sale was not made at the time required by law.⁶ The regularity of proceedings of the probate court in relation to a guardian's sale of real estate may, in an action in the nature of ejectment brought by the ward or his representatives against the purchaser or his representatives, be collaterally questioned for any of the irregularities specified in the statute.⁷ The formal approval of a guardian's bond is a mere formality, and want of it will not invalidate his sale of the ward's land, in a collateral action attacking it on such ground, where the guardian has accounted satisfactorily for the proceeds of the sale, and the purchase-money has gone to

¹ *Smith v. Race*, 27 Ill. 387; 81 Am. Dec. 235; *Campbell v. Harmon*, 43 Ill. 18; *Fitzgibbon v. Lake*, 29 Ill. 165; 81 Am. Dec. 302; *Rice v. Parkman*, 16 Mass. 326; *In re Whitlock*, 32 Barb. 48; *Berry v. Young*, 15 Tex. 369; *Barnes v. Hardeman*, 15 Tex. 366; *McAllister v. Moye*, 30 Miss. 258.

² *Mulford v. Beveridge*, 78 Ill. 455.

³ *Frazier v. Steenrod*, 7 Iowa, 339; 71 Am. Dec. 447.

⁴ *Ayers v. Baumgarten*, 15 Ill. 444; *Young v. Keogh*, 11 Ill. 642; *Rawlings v. Bailey*, 15 Ill. 178; *In re Harvey*, 16 Ill. 127; *Penn v. Heisey*, 19 Ill. 295; 68 Am. Dec. 597; *Stall v. Macalester*, 9 Ohio, 19.

⁵ *Hammann v. Mink*, 99 Ind. 279.

⁶ *Brown v. Christie*, 27 Tex. 73; 84 Am. Dec. 608.

⁷ *Montour v. Purdy*, 11 Minn. 384; 88 Am. Dec. 88.

the benefit of the ward.¹ Informalities in the recitals of a guardian's deed given in good faith, mistakes of the guardian in stating the date of license, or the insertion of irrelevant matter, should not avoid such deed.² A sale duly ordered and confirmed by the court passes no title upon failure of the purchaser to comply with the terms of the sale.³

It has been held that a guardian's sale is not void because of his neglect to execute the additional bond,⁴ or because the petition for sale was defective.⁵ A guardian is liable for the loss of the price of property sold by order of the court, where he disobeys the order as to place of sale and taking security; does not report the sale as directed for two years, though the sale is confirmed when reported; and neglects for four years, and until the purchaser and his sureties become insolvent, to take any steps to collect the money.⁶ The guardian, and not the judge or clerk of the court, is the proper custodian of the moneys arising from the sale of the ward's real estate.⁷

ILLUSTRATIONS.—The Illinois statute confers comprehensive powers on guardians, and in general terms empowers the county courts to authorize them to mortgage their wards' estates. *Held*, that the court may authorize a mortgage to secure a loan obtained in order to erect improvements on the ward's land: *United States Mortgage Co. v. Sperry*, 24 Fed. Rep. 838. The Oregon statute empowers the probate court "to order the renting, sale, or other disposal of the real or personal property of minors." *Held*, that the court cannot authorize a guardian to mortgage his ward's land: *Trutch v. Bunnell*, 11 Or. 58; 50 Am. Rep. 456. A guardian sold his ward's property without authority, the sale not proving for the ward's interest. The purchaser made part payment by canceling a debt owed by the guardian

¹ *Emery v. Vroman*, 19 Wis. 689; 88 Am. Dec. 726. *v. Morton*, 38 Me. 47; 61 Am. Dec. 229; *McKeever v. Ball*, 71 Ind. 398;

² *Williamson v. Woodman*, 73 Me. 163. *Barnett v. Bull*, 81 Ky. 127.

³ *Judson v. Sierra*, 22 Tex. 365. ⁴ *McKeever v. Ball*, 71 Ind. 398.

⁵ *Palmer v. Oakley*, 2 Doug. (Mich.) 433; 47 Am. Dec. 41; *Watts v. Cook*, 24 Kan. 278; *Arrowsmith v. Harmon*, 42 Ohio St. 254. *Contra*, *Williams*

⁶ *Draper v. Joiner*, 9 Humph. 612; 49 Am. Dec. 719.

⁷ *State v. Steele*, 21 Ind. 207; 83 Am. Dec. 346.

individually, the guardian being in debt, and circumstances suggesting that he intended to use the whole sum for his own purposes. *Held*, that the sale should not be confirmed: *McDuffie v. McIntyre*, 11 S. C. 551; 32 Am. Rep. 500. An executor and guardian in Rhode Island, by virtue of a special law concerning the sale and investment of the estate of infants and of other persons who are not *sui juris*, and by order of the probate court conveyed the property of infants to a manufacturing corporation by way of investment in its capital stock. *Held*, that the conveyance and investment were protected by the law, and that no account could be demanded, except for the stock and its dividends: *Hoyt v. Sprague*, 103 U. S. 613. A second guardian foreclosed a mortgage given by his predecessor to secure the sureties on his bond. The second guardian had from the first guardian a general power to sell the land. After the foreclosure, the second guardian made sales under the power. *Held*, that sales made after the death of the ward were inoperative: *Robertson v. Coates*, 65 Tex. 37. An intestate died, leaving a widow and six children. As guardian of four of them, the widow petitioned for the sale of their interest in the land, describing it as the undivided four-ninths part. An order of sale was granted. Subsequently, during the term, she filed another petition, averring a mistake, and alleging their interest to be an undivided four-sixths part, subject to her life estate. The former order was revoked and a sale made under the last petition. *Held*, that, as against the widow's heirs by a second marriage, the purchaser acquired only an undivided four-ninths part: *Erwin v. Garner*, 108 Ind. 488.

§ 875. Duty to Render Accounts — Settlements with Guardian. — Probate guardians are required to render accounts to the court at certain times.¹ As to those ren-

¹ Schouler on Domestic Relations, 372; *Gilbert v. Guptill*, 34 Ill. 112; *Hutcheson v. Mudd*, 6 J. J. Marsh. 580; *Reynolds v. Walker*, 29 Miss. 250; *Whitney v. Whitney*, 7 Smedes & M. 740; *McAlister v. Olmstead*, 1 Humph. 210; *Armstrong v. Walkup*, 12 Gratt. 608; *Modawell v. Holmes*, 40 Ala. 391; *Seaman v. Duryea*, 11 N. Y. 324; *In re Getts*, 2 Ashm. 441; *Willis v. Fox*, 25 Wis. 646. A father may be compelled to account, as guardian of an infant child, of whose property he has enjoyed the benefit: *Van Epps v. Van Deusen*, 4 Paige, 64; 25 Am. Dec. 516. A guardian must account for all the property which he receives

as belonging to the ward, and cannot be permitted to contest the title of the ward to the property: *McAlister v. Olmstead*, 1 Humph. 210. Where a guardian holds the same appointment from two states, he is required to account for the money received for his ward in that state only in which the transaction took place: *Smoot v. Bell*, 3 Cranch C. C. 343. Where a guardian is absent from the state, and has not given security for the faithful discharge of his trust, but has appointed an agent to manage the estate of his ward, the orphans' court has power to call upon the agent to file and settle an account of his agency: *In re Getts*,

dered from time to time during the guardianship, they are not conclusive, either on the guardian or on the ward, even though judicially approved.¹ The annual accounts of guardians are intended only to inform the court and the ward of the manner in which the guardian is performing his trust, and not for the purpose of judicial examination and settlement; but the ward or court may act upon them to remove the guardian, or to obtain further security for his performance of his duties.² The annual settlement, although not conclusive against his sureties, tends to show a liability for the amount stated.³ A guardian's report, not referring to the ward's age, asking for any discharge, or claiming any commissions, although approved by an order of the court, cannot be urged as a final settlement in bar of a citation for final accounting.⁴ The final account, which is rendered upon the completion of the trust, when it has been examined and approved by the court, and has not been reversed on appeal, and the time for the ward's objecting to it has expired, concludes all parties interested, and cannot be reopened in any court.⁵ Where a guardian has made a final settlement with his ward in the county court, the law presumes that he has accounted for all the ward's property in his possession.⁶

² Ashm. 441. The failure of a guardian, in his report, to disclose that he has received money for his ward amounts to a conversion thereof: *Asher v. State*, 88 Ind. 215.

¹ *Douglas's Appeal*, 82 Pa. St. 169; *Ashley v. Martin*, 50 Ala. 537; *Matlock v. Rice*, 6 Heisk. 33; *Bourne v. Maybin*, 3 Woods, 724; *Manpin v. Dulany*, 5 Dana, 589; 30 Am. Dec. 699; *Starrett v. Jameson*, 29 Mo. 504; *Wade v. Lobell*, 4 Cush. 150; *State v. Baker*, 8 Md. 44; *Vaughan v. Bibb*, 46 Ala. 153; *In re Cardwell*, 55 Cal. 137; *State v. Jones*, 89 Mo. 470. An account current under oath filed by a guardian, and ordered to be recorded without any further action on it by the probate judge, is not a partial settlement: *Radford v. Morris*, 66 Ala. 283.

² *Diaper v. Anderson*, 37 Barb. 168.

³ *State v. Booth*, 9 Mo. App. 583.

⁴ *Bennett v. Hanifin*, 87 Ill. 31.

⁵ *Boynton v. Dyer*, 1 Pick. 1; *Cummings v. Cummings*, 128 Mass. 532; *Yerger's Appeal*, 34 Pa. St. 173; *Stevenson's Appeal*, 32 Pa. St. 318; *Smith v. Davis*, 49 Md. 470; *Manning v. Barker*, 8 Md. 44; *Diaper v. Anderson*, 37 Barb. 168; *Seaman v. Duryea*, 11 N. Y. 324; *Allman v. Owen*, 31 Ala. 167; *Reynolds v. Walker*, 29 Miss. 250; *Holland v. State*, 48 Ind. 391; *Brent v. Grace*, 30 Mo. 253; *Lynch v. Rotan*, 39 Ill. 14; *Chilton v. Parks*, 15 Ala. 671; *Jones v. Fellows*, 58 Ala. 343; *Railsback v. Williamson*, 85 Ill. 494; *Garton v. Botts*, 73 Mo. 274; *Candy v. Hammore*, 76 Ind. 125; *Coffin v. Bramlitt*, 42 Miss. 194; 97 Am. Dec. 449.

⁶ *Smith v. Denny*, 34 Mo. 219.

An order by the county court that a guardian pay over to his successor the balance found due upon the former's approved report is conclusive upon him and his sureties. They are estopped to deny the truth of his report.¹ Confirmation of the report of auditors appointed to examine a guardian's account is equivalent to a decree that the sum ascertained by the auditors was due and payable to the ward by her guardian, and conclusive and unimpeachable until reversed or modified on appeal.² If a guardian has voluntarily submitted the settlement of his guardianship in a probate court other than that appointing him, he and his sureties are estopped from denying the jurisdiction of the court, however irregular its proceedings may have been.³

A guardian is "discharged" within the meaning of the Vermont statute fixing the period of limitations of actions on guardians' bonds, when he has settled his account, and been ordered by the probate court to pay over to his ward the money in his hands.⁴ A guardian's final account must include all the items embraced in former partial accounts. It is irregular to start the final account with the balance of a former partial account. But this is not such a substantial error as will justify a petition of review.⁵ He cannot avoid his liability to account to his wards after they come of age, by contending that the records do not show that he qualified or was appointed, he having acted.⁶ A guardian who, in making his final report and settlement, conceals the fact that certain securities in which he has invested his ward's funds are worthless is guilty of fraud.⁷ If a guardian's final settlement precedes his resignation, the settlement is void.⁸ A settlement made with the ward before or after he becomes of age, and not with

¹ *Ream v. Lynch*, 7 Ill. App. 161.

² *Commonwealth v. Moltz*, 10 Pa. St. 527; 51 Am. Dec. 499.

³ *Norton v. Miller*, 25 Ark. 108.

⁴ *Orleans Probate Court v. Child*, 51 Vt. 82.

⁵ *Yeager's Appeal*, 34 Pa. St. 173.

⁶ *Gregory v. Field*, 63 Miss. 323.

⁷ *Slauter v. Favorite*, 107 Ind. 291; 57 Am. Rep. 106.

⁸ *Glass v. Glass*, 80 Ala. 241.

the court, is no bar.¹ Courts look upon settlements made by guardians with wards recently come of age with distrust, and will not consider them binding unless made with the fullest deliberation and the most abundant good faith on the part of the guardian.² When a guardian has a settlement with his ward shortly after the ward's maturity, in the absence of her advisers and friends, the law, founded in public policy, presumes fraud, and throws the burden of rebutting that presumption upon the guardian.³ But after a fair settlement, sanctioned by the wards during many years, and by the court of probate at the time, a court will reopen the matter only in a case very clearly calling for new action.⁴ A final settlement of a guardian's account made by him voluntarily before his ward has attained majority is not void on that account.⁵ A ward's receipt to his guardian, "in full of all demands," executed on arriving at full age, is not conclusive, but may be contradicted by parol evidence.⁶ So a receipt given the guardian by the ward after her majority, not duly acknowledged before a proper officer, will not discharge the guardian.⁷ An action by a ward against his guardian for a settlement of his accounts, or by the representative of the ward, must be brought in the county where the guardian was qualified.⁸

ILLUSTRATIONS.—A guardian was appointed by a court not having the special jurisdiction, and in good faith money of his

¹ *Say v. Barnes*, 4 Serg. & R. 112; 8 Am. Dec. 679; *Hickman's Appeal*, 7 Pa. St. 466; *Com. v. Moltz*, 10 Pa. St. 529; 51 Am. Dec. 499; *Johnson v. Johnson*, 2 Hill Ch. (S. C.) 277; 29 Am. Dec. 72; *Hiestand v. Kuns*, 8 Blackf. 345; 46 Am. Dec. 481; *Stanley's Appeal*, 8 Pa. St. 431; 49 Am. Dec. 530; *Kittridge v. Betton*, 14 N. H. 401; *Marr's Appeal*, 78 Pa. St. 66; *Wing v. Rowe*, 69 Me. 282; *Mead v. Bakewell*, 8 Mo. App. 549; *Glass v. Glass*, 76 Ala. 368.

² *Sullivan v. Blackwell*, 28 Miss. 737; *Andrews v. Jones*, 10 Ala. 400; *Richardson v. Linney*, 7 B. Mon. 571; *Wright v. Arnold*, 14 B. Mon. 638; 61

Am. Dec. 172; *McClellan v. Kennedy*, 8 Md. 230; *Spalding v. Brent*, 3 Md. Ch. 411; *Meek v. Perry*, 36 Miss. 190; *Williams v. Powell*, 1 Ired. Eq. 460; *Boyett v. Hurst*, 1 Jones Eq. 166; *Hawkins' Appeal*, 32 Pa. St. 263.

³ *Harris v. Carstarphen*, 69 N. C. 416.

⁴ *Brown v. McWilliams*, 29 Ga. 194; *Southall v. Clark*, 3 Stew. & P. 338; *Whedbee v. Whedbee*, 5 Jones Eq. 392.

⁵ *Spencer v. Spencer*, 50 Ala. 445.

⁶ *Beedle v. State*, 62 Ind. 26.

⁷ *In re Simonda*, 4 Mo. App. 598.

⁸ *Stone v. Powell*, 13 B. Mon. 342.

ward was received by him; he settled his account in the proper court. *Held*, that he was estopped from denying his liability in an action by a subsequent guardian to recover the money; and that both he and his surety were bound by his official bond: *McClure v. Commonwealth*, 80 Pa. St. 167. A guardian received from the administrator, as part of his ward's distributive share, in 1864, a bond made by himself in 1862, *Held*, that he must account for the value of the bond as of the date it was given: *State v. Osborne*, 67 N. C. 259. A guardian kept his accounts so imperfectly that it was impossible to tell whether he should receive certain credits as general or as special guardian. *Held*, that each fund should be credited with one half the amount: *Smith v. Gummere*, 39 N. J. Eq. 394. An *ex parte* settlement of a guardian was made with no other action by the probate court than administering to him or her an oath as to the correctness of the account. *Held*, to be absolutely void: *Gravett v. Malone*, 54 Ala. 19. A guardian when his ward become of age exhibited to her his books of account, and made a statement showing the balance due her, and the succeeding year a similar statement was made; but no formal account was delivered to her, nor did she examine the particulars thereof in the books. *Held*, that she was entitled to an account of the whole trust: *Rapalje v. Norsworthy*, 1 Sand. Ch. 399. A judgment approving the final account of a guardian recited that the ward had attained his majority. In a suit brought by the ward to revise the settlement, *held*, that he might show that he was under age when the judgment was rendered: *Jones v. Parker*, 67 Tex. 76.

§ 876. Liabilities of Guardian — In General. — As we have said, a guardian must exercise in the conduct of the trust the care of a good business man in his own affairs. If by his negligence the estate suffers, he is accountable personally,¹ but he is not responsible for funds stolen from

¹ *Royers's Appeal*, 11 Pa. St. 36; *Glover v. Glover*, 1 McMull. 153; *Wynn v. Benbury*, 4 Jones Eq. 395; *Nicholson's Appeal*, 20 Pa. St. 50; *Konigsmacher v. Kimmel*, 1 Pen. & W. 207; 21 Am. Dec. 374; *Jones's Appeal*, 8 Watts & S. 143; 42 Am. Dec. 282; *Hemphill v. Lewis*, 7 Bush, 214; *Stothoff v. Reed*, 32 N. J. Eq. 213; *Jack's Appeal*, 94 Pa. St. 367; *Robertson v. Wall*, 85 N. C. 283; *Haddock v. Bank*, 66 Ga. 496; *Elliot v. Howell*, 78 Va. 297; *McLean v. Hosea*, 14 Ala. 194; 48 Am. Dec. 94; the court saying: "The office of guardian was originated upon the hypothesis that persons of immature years were incapable of protecting their own interests. An acceptance of such a trust imposes an obligation to perform its duties, among the most prominent of which is the use of diligence in managing and taking care of the ward's estate. For if it be lost or injured by the negligence or misfeasance of the guardian, he is liable at least to the same extent that any trustee would be under the same circumstances: See *Tibbs v. Carpenter*, 1 Madd. 298; *Powell v. Evans*, 5 Ves. 839; *Eagleston v. Kingston*, 8 Ves.

him without his fault;¹ as for a loss from an investment made in good faith, and with prudence and care.² Where he takes a note without security for money which has never come into his hands, he is not responsible for the loss of the debt by the maker's subsequent insolvency.³ But *aliter* where he loans funds in his hands without security;⁴ and this, irrespective of the credit of the borrower.⁵ A loan by a guardian on the borrower's note secured by pledge of stock in a manufacturing company at three fourths of its par and less than three fourths of its market value is an investment justified by sound discretion, and the guardian will not be held responsible for a loss resulting from a subsequent depreciation in the value of the stock.⁶ A guardian may lend his ward's money without leave of the court; but if he does, and a loss ensues, he must show clearly and beyond a reasonable doubt that the loss was not due to a want of good business judgment in taking the security.⁷

A guardian is presumably liable to his ward for the

466; *Rams on Assets*, 538; 2 Kent's Com., 1st ed., 187 et seq.; 2 Kinne's Comp. 391 et seq., and cases there cited; *Johnson's Appeal*, 12 Serg. & R. 317; *Monell v. Monell*, 5 Johns. Ch. 286; 9 Am. Dec. 298. It is incumbent on a trustee to manage the trust estate in the same manner that a discreet man would manage his own concerns, and he is accountable if he neglects to perform his duty: *Rainsford v. Rainsford*, Rice Eq. 343. If he acts *bona fide* and with due diligence, he will be protected, but if he grossly violates his duty, or is guilty of unreasonable negligence, his acts are inspected with severity, and rules of strict, if not rigorous, justice are applied: *Diffendorfer v. Winder*, 3 Gill & J. 311; *Shepherd v. Towgood*, Turn. & R. 379; *Hester v. Hester*, 1 Dev. Eq. 328. In *Bank of Virginia v. Craig*, 6 Leigh, 399, it was held that if a guardian unnecessarily sell bank stock belonging to his ward, and appropriate the proceeds, he and his sureties shall be held to replace the

stock, or account for and pay its present value and all dividends accruing thereon since the sale, and commissions were allowed to the guardian on the dividends only."

¹ *Furman v. Coe*, 1 Caines Cas. 96; *Atkinson v. Whitehead*, 66 N. C. 296. In Alabama, he was held not liable for funds of the ward invested in Confederate bonds, and lost: *Watson v. Stone*, 40 Ala. 451; 91 Am. Dec. 484; but see *Houston v. Deloach*, 43 Ala. 364; 94 Am. Dec. 689; *Hall v. Hall*, 43 Ala. 488; 94 Am. Dec. 703.

² *State v. Slevin*, 93 Mo. 253; 3 Am. St. Rep. 526.

³ *Konigsmacher v. Kimmel*, 1 Pen. & W. 207; 21 Am. Dec. 374; *Nyce's Estate*, 5 Watts & S. 256; 40 Am. Dec. 498; *Stem's Appeal*, 5 Whart. 476; 34 Am. Dec. 569; *Calhoun's Estate*, 6 Watts, 189.

⁴ *Dietterich v. Heft*, 5 Pa. St. 94.

⁵ *Lee v. Lee*, 55 Ala. 590.

⁶ *Lovell v. Minot*, 20 Pick. 116; 32 Am. Dec. 206.

⁷ *Hughes v. People*, 10 Ill. App. 148.

nominal amount of debts due the ward's estate which he has failed to collect; if they were not collectible for their face, that is for him to show in defense.¹ To surcharge him with a certain fund on the ground that in not collecting it he was guilty of negligence, it must be shown, not only that he had the legal right, but was subject to the legal duty, to collect it in his official capacity.² He is not liable to his ward for delaying to collect the distributive share to which the latter is entitled in an estate, when it does not appear that the ward was subjected to loss by such delay.³ A sale on credit of shares in a corporation for which he takes a purchaser's note secured by two indorsers, and also the note of another person secured by a mortgage on real estate, will be deemed to be in good faith, and in the exercise of a sound discretion, and he will not be required to make good any resulting loss.⁴ A guardian who takes the par funds of his ward at interest, and subsequently loans out the same to be repaid in a currency which at the time was greatly depreciated, and daily diminishing in value with great rapidity, is responsible for the loss, where the loan turns out to be subsequently worthless on account of such depreciation.⁵ A guardian by improvidently investing his ward's money in a note of a single person renders the sureties on his bond liable for any loss that may occur, although he dies and the borrower becomes administrator of his estate, and in settling the account of his intestate as guardian returns the note as assets of the ward's estate.⁶ Equity will hold all trustees, and especially guardians, liable for the trust fund if they make use of it or mingle it with their own money.⁷ And courts will presume strongly in

¹ *Seigler v. Seigler*, 7 S. C. 317.

² *Leonard's Appeal*, 95 Pa. St. 196.

³ *Clark v. Tompkins*, 1 S. C. 119.

⁴ *Lovell v. Minot*, 20 Pick. 116; 32 Am. Dec. 206.

⁵ *Coffin v. Bramlitt*, 42 Miss. 194; 97 Am. Dec. 449.

⁶ *Richardson v. Boynton*, 12 Allen,

138; 90 Am. Dec. 141.

⁷ *Spear v. Spear*, 9 Rich. Eq. 184;

Clay v. Clay, 3 Met. (Ky.) 549; *Bank of Virginia v. Craig*, 6 Leigh,

399.

favor of the ward, and against the guardian, if he has been delinquent or guilty of neglect.¹ A guardian taking a bond to himself personally, and not as guardian, for money due the estate, is liable for the loss of the money by the obligor's insolvency.² A guardian lending trust money at usurious interest and collecting the same, but accounting for legal interest only, is guilty of such misconduct as to make him liable for the loss of the debt by the debtor's insolvency.³ Where a guardian does not cultivate his ward's farm as a prudent farmer would his own land, the depreciation of the value of the property by reason of such neglect should be made good by him.⁴ An investment by a guardian of the estate of his ward in confederate bonds was unlawful. For a loss thus occurring the guardian is liable. That the motive of a guardian in changing an investment was to save property from confiscation does not affect his liability.⁵

He has been held responsible for money of the ward deposited in his own name in a bank which afterwards fails;⁶ so he is liable for its ultimate loss, where he fails to collect interest on a note as it falls due.⁷ He is not liable for a tort of his ward,⁸ nor for money paid to him as such by mistake where he has paid it over to the ward before notice of the mistake;⁹ nor for failing to insure a farm-house lying outside a village;¹⁰ nor for an error of judgment in having leased the lands of his wards for a less rent than could have been obtained, where he acts in manifest good faith, first having secured the approval of the probate court.¹¹ A guardian who, acting in good faith and with a due regard for the interest of his ward,

¹ *Jennings v. Kee*, 5 Ind. 257.

² *Draper v. Joiner*, 9 Humph. 612; 49 Am. Dec. 720.

³ *Draper v. Joiner*, 9 Humph. 612; 49 Am. Dec. 720.

⁴ *Willis v. Fox*, 25 Wis. 646.

⁵ *Lamar v. Micou*, 112 U. S. 452.

⁶ *Jenkins v. Walter*, 8 Gill & J. 218; 29 Am. Dec. 539.

⁷ *Stem's Appeal*, 5 Whart. 472; 34 Am. Dec. 569.

⁸ *Garrigus v. Ellis*, 95 Ind. 598.

⁹ *Massey v. Massey*, 2 Hill Ch. 492.

¹⁰ *Means v. Earls*, 15 Ill. App. 273.

¹¹ *McElheny v. Musick*, 83 Ill. 329.

receives paper money in the usual course of business, and which is the circulating medium at the time, but which afterwards depreciates and becomes worthless, is not chargeable with the loss.¹ An attachment for contempt against a guardian for failing to pay over to a receiver, duly appointed by the court of equity, moneys which appear to be due by the guardian, on his returns to the ordinary, will not be granted, when such moneys are not in fact a balance in hand, but merely represent a debt due by the guardian to the ward's estate, and which the guardian is unable to pay.² His responsibility for the property of his ward extends only to such as is accessible to him.³ A guardian whose appointment is a nullity can yet be made responsible for the property of the infant which has come into his hands, and for the management of the estate.⁴ He is not liable on his bond for money devised to his ward to be paid to her when she comes of age, but improperly paid over to the guardian by the executor during the ward's minority.⁵ He will not be charged with assets which never reached his hands from another state, if he used such diligence in attempting to collect as a prudent business man would ordinarily exercise under the circumstances; nor with negligence in employing agents and attorneys in such other state instead of going there himself.⁶

ILLUSTRATIONS. — GUARDIAN HELD LIABLE. — Guardians take a mortgage on property worth three thousand five hundred dollars to secure a debt of two thousand dollars due their ward, and upon foreclosure, allow it to be sold at auction for five hundred and forty dollars. *Held*, that they are liable to their ward for the loss: *McLean v. Hosea*, 14 Ala. 194; 48 Am. Dec. 94. A guardian, knowing that his ward was chaste, uneducated, feeble-minded, and ignorant of the meaning of sexual intercourse, worked upon her passions, while she was acting as servant in his family, by undue familiarities, and then negli-

¹ *Coffin v. Bramlitt*, 42 Miss. 194;
97 Am. Dec. 449.

² *Browning v. Hadley*, 33 Ga. 271.

³ *Bethune v. Green*, 27 Ga. 56.

⁴ *Earle v. Crum*, 42 Miss. 165.

⁵ *Hinckley v. Harriman*, 45 Mich.

343.

⁶ *Harris v. Berry*, 82 Ky. 137.

gently permitted his son to have intercourse with her, whereby she became pregnant. *Held*, that he was liable: *Brattain v. Cannady*, 96 Ind. 266. For five years a guardian made no report, but started his ward in several business enterprises which proved failures, and furnished him money to live an extravagant life. *Held*, that he was liable: *In re Mells*, 64 Iowa, 391. A guardian, in 1861, sold his ward's mortgages and took in payment a promissory note which was paid in 1863 in confederate money. *Held*, that he was liable: *Cureton v. Watson*, 3 S. C. 451. A guardian rented the real estate of his ward for several years in succession, in January, the renting being effected by auction. The custom at the place was to rent in the spring; at that time a higher rent could be obtained than could in January, and the rent received was much too low. *Held*, that the guardian was liable for the difference between the rent received and that which should have been received: *Knothe v. Kaiser*, 5 Thomp. & C. 4; 2 Hun, 515. A guardian, on the day of the receipt of money belonging to his ward, deposited it, in his own name, in a banking institution then in good standing, but which subsequently failed, and took a certificate thereof payable to himself or order. *Held*, that the loss should fall upon him, though on the day of deposit, by indorsement on the certificate, he declared it to be the property of his ward and placed in bank for his benefit: *Jenkins v. Walter*, 8 Gill & J. 218; 29 Am. Dec. 539. A guardian loaned funds of his ward on a promise of security, neither the loan being returned nor security given. *Held*, that he was liable: *Post's Estate*, Myrick's Probate, 230. A guardian, by mistake, included in a deed of land of his ward one lot to which the ward had no title, and for himself as well as his ward, etc., entered into covenants of title with respect thereto. *Held*, that he was liable: *Holyoke v. Clark*, 54 N. H. 578.

ILLUSTRATIONS (CONTINUED). — GUARDIAN HELD NOT LIABLE. — A guardian lent \$142 of his ward's money, and some of his own, to one person, taking no security but his single note for both sums. He acted with due care and in good faith. *Held*, that he was not liable to the ward for loss by the subsequent bankruptcy of the borrower: *Barney v. Parsons*, 54 Vt. 623; 41 Am. Rep. 858. A guardian lent money of his ward on mortgage of land to a borrower of good standing, who was reputed solvent. The guardian caused the title to be searched, and after the search, ten days elapsed before the transaction was consummated, during which time the borrower put another mortgage on the property, so that the guardian's mortgage became worthless, the borrower becoming insolvent. *Held*, that the guardian should not be compelled to bear the loss, the borrower hav-

ing told him at the consummation of the transaction that the land was still unencumbered: *Slauter v. Favorite*, 107 Ind. 291; 57 Am. Rep. 106. A guardian invested cash of his ward in the promissory note of a person in good credit, with stock of a manufacturing company as collateral, at less than its par and market value by about one fourth. *Held*, that he acted in good faith and with sound discretion; and although the maker of the note failed, and the shares fell in value below the amount of the note before its maturity, that he was not responsible for the loss: *Lovell v. Minot*, 20 Pick. 116; 32 Am. Dec. 206. In 1830 an administrator, having in his hands funds of an infant distributee of the intestate, invested the same in stock of the Bank of the United States; in 1835 a guardian was appointed for the infant, who received from the administrator the stock in full of the infant's share, etc.; the bank was in high credit until 1839, when the price of the stock sunk suddenly and greatly in the market, and finally became almost worthless. *Held*, that he was not liable for the depreciation in the value of the stock: *Boggs v. Adger*, 4 Rich. Eq. 408. At the time it was beneficial to the ward that the guardian should change his personal into real estate, but such change afterwards proved injurious, *held*, that he was not responsible: *In re Bonsall*, 1 Rawle, 266. Money was stolen from an iron safe, where it had been deposited by a guardian as a trust fund, with his own money and valuable papers, and the theft was not discovered for several days, and pursuit was made for the thief in a reasonable time. *Held*, not guilty of negligence: *Atkinson v. Whitehead*, 66 N. C. 296. A guardian in North Carolina, in 1862, collected three thousand dollars on a well-secured, ante-war guardian note, and invested the same for the benefit of his ward in seven-thirty confederate bonds, as he also did a large amount of his own funds. *Held*, not liable: *Longmire v. Herndon*, 72 N. C. 629. A guardian seeking to recover for his ward a claim from the United States employed a reputable claim agent. The agent collected and kept the money. *Held*, that he was not responsible: *Holeman v. Blue*, 10 Ill. App. 130. A guardian in good faith sold, on a credit of twenty days, the cotton of his wards, taking from the buyer his note without security. At the time of the sale the buyer was solvent, and owned real estate, but before the note was collected became insolvent, and unable to pay the note. *Held*, that he was not liable: *State v. Morrison*, 68 N. C. 162.

§ 877. Liabilities of Guardian — Contracts Made by Him as Guardian.—If a guardian contracts a debt for his ward's benefit,—although the court will reimburse

him out of the ward's estate, if he have one,—he becomes personally liable, even though the debt is for necessities;¹ but if the contract shows that the guardian was not only contracting "as guardian," but that the credit was given on the faith of the assets of the ward in the hands of the guardian, the latter incurs no personal responsibility.² Thus a guardian is personally liable on a promissory note, even though he sign as "guardian";³ nor can the guardian by contract bind his ward.⁴ A guardian's stipulation in a lease to pay for improvements on the estate do not bind the ward;⁵ nor can a guardian make admissions to bind an infant.⁶ An action will not lie against a guardian and his ward, jointly, to recover a debt which the ward incurred previous to the appointment of the guardian.⁷ A mechanic cannot maintain *assumpsit* against the guardian of a minor for labor performed upon the ward's buildings.⁸ If a guardian, in his representative capacity, makes a contract or covenant which he has no right to make, and which is not binding upon his ward, he is personally bound to make it good.⁹

ILLUSTRATIONS.—A guardian contracted, describing himself as such, for stone for a building for his ward, and signed the contract as guardian. The contract did not assume to bind the ward, and did not limit the guardian's liability by a provision that the price should be paid from the assets belonging to the ward in the guardian's hands. *Held*, that the guardian was personally liable on the contract: *Sperry v. Fanning*, 80 Ill. 371.

¹ *Rollins v. Marsh*, 128 Mass. 116; *Simms v. Norris*, 5 Ala. 42.

² *Sperry v. Fanning*, 80 Ill. 371.

³ *Thacker v. Dinsmore*, 5 Mass. 299; 4 Am. Dec. 61; *Foster v. Fuller*, 6 Mass. 58; 4 Am. Dec. 87; *McGill v. O'Connell*, 33 N. J. Eq. 256. "Guardians cannot bind their ward's estate . . . by bills or notes; and hence, though they sign themselves as guardians, they are personally bound, because otherwise the instrument would be invalid. It is true that they may

contract to pay out of an estate, but then the payment would be conditional on the condition of the estate, and the instrument not negotiable": *Daniel on Negotiable Instruments*, 271.

⁴ *Rollins v. Marsh*, 128 Mass. 116.

⁵ *Barrett v. Cocke*, 12 Heisk. 566.

⁶ *Cochran v. McDowell*, 15 Ill. 10.

⁷ *Allen v. Hoppin*, 9 R. I. 258.

⁸ *Robinson v. Hersey*, 60 Me. 225.

⁹ *Mason v. Caldwell*, 10 Ill. 196; 48 Am. Dec. 330.

§ 878. Liabilities of Guardian — To Support and Maintain Ward. — A guardian not the parent of the ward is not obliged to support him from his own purse,¹ nor is he liable on the ward's contracts, even for necessities,² unless he has, expressly or impliedly, by his conduct, authorized them or afterwards ratified them.³ The guardian is presumed to supply his ward with necessities, and a person supplying them must contract with the guardian, and not with the ward.⁴ Where he advances money for the support and education of the ward, he is entitled to reimbursement from the estate of the latter.⁵ A guardian is entitled to be allowed for money furnished his ward

¹ "The remedy of those who furnish necessities to minors under guardianship having property is against their estate in the hands of the guardian, but not against the guardian personally, unless he enters into a contract on which he can be held liable individually": *Spring v. Woodworth*, 4 Allen, 328; *Bredin v. Dinen*, 2 Watts, 95; *Gwaltney v. Cannon*, 31 Ind. 227; *McDaniel v. Mann*, 25 Tex. 101; *Overton v. Beavers*, 19 Ark. 623; 70 Am. Dec. 610; *Hutchinson v. Hutchinson*, 19 Vt. 437.

² *Id.*; *Overton v. Beavers*, 19 Ark. 623; 70 Am. Dec. 610; *Call v. Ward*, 4 Watts & S. 118; 39 Am. Dec. 64, the court saying: "The father is entitled to the service of the child, and is bound to support him, but the guardian is not entitled to the service of his ward, and is not bound to support him out of his own estate: *Swift's System*, 50. If, therefore, a parent refuses to furnish his child with necessities, a stranger may do so, and charge the parent with the price upon an implied *assumpsit*; but this is not true with respect to a guardian, who is only liable personally on a contract. And the difficulty in the way of the plaintiff is, that there is neither a contract express or implied, for the case finds that the guardian always refused to allow the plaintiff anything for the maintenance of the children, alleging that he was only guardian to take care of the estate of the minors. We have

nothing to do with the reason; it is enough that he refused to become bound for the expense of their maintenance. But it may be asked, what is to be done where the guardian refuses to furnish necessities for his ward? Miserable, indeed, would be his condition, if he might run the risk of starvation with a plentiful estate. The remedy is by application to the court, who will dismiss the guardian for neglect of duty, or the infant may himself purchase necessities; or if, of such a tender age that he cannot contract himself, a third person may supply his wants. But then the guardian is not liable, but the infant. In that case suit must be brought against the infant, who can appear only by guardian, and not against the guardian himself; and the judgment, when rendered, is against the infant, and execution can only be had of the estate of the infant."

³ *Hutchinson v. Hutchinson*, 19 Vt. 437; *Tucker v. McKee*, 1 Bail. 344; *Hargrove v. Webb*, 27 Ga. 172; *Oliver v. Houdlet*, 13 Mass. 237; 7 Am. Dec. 134.

⁴ *State v. Cook*, 12 Ired. 67; *Royston v. Royston*, 29 Ga. 82; *Guthrie v. Murphy*, 4 Watts, 80; 28 Am. Dec. 681; *Call v. Ward*, 4 Watts & S. 118; 39 Am. Dec. 64; *Fessenden v. Jones*, 7 Jones, 14; 75 Am. Dec. 445.

⁵ *Smith's Appeal*, 30 Pa. St. 397; *Rollins v. Marsh*, 128 Mass. 110.

for the purpose of completing his medical education;¹ also for board furnished his ward; also for keeping the ward's horse, in a proper case.²

A guardian cannot recover for the board of his ward when her services were worth as much as her board.³ Where a guardian charges his ward for board, she may set off the value of services rendered.⁴ If a guardian commit the custody and control of a female ward to a person who compels personal services from her, while her education and culture are wholly neglected, he will not be allowed a credit for her board within the value of her personal services, nor for expenditures beyond the income of her estate, when she is able to maintain herself.⁵ A guardian suffering a ward to remain in idleness after he is old enough to earn his living, unless he is obtaining an education, has not, it seems, any equitable claim against such ward for his support.⁶ Where he permits his ward to reside with its mother, the latter is authorized to employ for and at the cost of the ward medical aid when needed, and the law implies a promise by the guardian to pay the value of such services actually rendered.⁷ He should be allowed compensation for the support of his infant wards, though he had promised their friends that he would do it without charge, and in fact kept no accounts against them.⁸ While a father is guardian of his children, who are worth property, while he is in straitened circumstances, he may charge the estate of his children with a part of the expense of their maintenance.⁹ A guardian of the person and property of an infant ward has the same right to judge as to what are necessities for

¹ Smith's Appeal, 30 Pa. St. 397.

² Owen v. Peebles, 42 Ala. 338.

³ Hayden v. Stone, 1 Duvall, 396.

⁴ In re Clark, 36 Hun, 301.

⁵ Starling v. Balkum, 47 Ala. 314.

⁶ Clark v. Clark, 8 Paige, 152; 35 Am. Dec. 676.

⁷ Walker v. Brown, 3 Bush, 686; 96 Am. Dec. 277.

⁸ Armstrong v. Walkup, 8 Gratt. 372.

⁹ Harring v. Coles, 2 Bradf. 349;

Cunningham v. Cunningham, 4 Gratt. 43. And a mother may be allowed for past maintenance: In re Winsor, 5 Demarest, 340.

his ward, according to her state and social position, that a parent has for a child.¹ The guardian has a liberal discretion in making expenditures from the income for the support and maintenance of the ward.²

In the support of the ward, the guardian must not spend more than the income of the ward's estate, without an order of court.³ Where a guardian seeks an allowance of his account, in which the expenditures exceed the income of his ward's estate, he must show as strong a

¹ *Nicholson v. Spencer*, 11 Ga. 607; *Caldwell v. Young*, 21 Tex. 800.

² *Brown v. Mullins*, 24 Miss. 204; *Speer v. Tinsley*, 55 Ga. 89.

³ In *re Bostwick*, 4 Johns. 100; *Villard v. Robert*, 2 Strob. Eq. 40; 49 Am. Dec. 655; *Beeler v. Dunn*, 3 Head, 87; 75 Am. Dec. 762; *Myers v. Wade*, 6 Rand. 444; *State v. Clark*, 16 Ind. 97; *McDowell v. Caldwell*, 2 McCord Ch. 43; 15 Am. Dec. 635. "The English rule is undoubtedly strict, but as to probate guardians and in modern practice, legal formalities have been considerably relaxed. In most of the United States, the guardian is doubtless justified in breaking the principal fund under strong circumstances of necessity for the benefit of the ward, and he may leave his conduct to the subsequent approval of the court when he presents his accounts. In cases of risk and uncertainty, however, the proper course is to obtain a previous order": *Schouler on Domestic Relations*, 338; *Davis v. Harkness*, 1 Gilm. 173; 41 Am. Dec. 184; *Phillips v. Davis*, 2 Sneed, 520; 62 Am. Dec. 472; *Gilbert v. McEachen*, 38 Miss. 469; *Rinker v. Street*, 33 Gratt. 663; *Roseborough v. Roseborough*, 59 Tenn. 314; *Speer v. Tinsley*, 55 Ga. 89; *Cohen v. Shyer*, 1 Tenn. Ch. 195; *Brown v. Mullins*, 24 Miss. 204; *Dalton v. Brown*, 51 Mass. 585; *Shaw v. Cobb*, 63 N. C. 377; *Barnes v. Ward*, Busb. Eq. 93; 57 Am. Dec. 590; In *re Oakley*, 3 Demarest, 140; *Jones v. Parker*, 67 Tex. 76. So as to the guardian of a lunatic: *Patton v. Thompson*, 2 Jones Eq. 441; 67 Am. Dec. 222. In *Beeler v. Dunn*, 3 Head, 87, 75 Am. Dec. 762, the court say: "There is no doubt of the power of a court of chancery to break into

the principal, or to authorize a guardian to do so, where the fund is so small that the interest will not afford the means of a competent maintenance and education to the infant. But, according to the current of authority, the guardian is not at liberty to break in upon the principal of the fund of his own authority. The income is the proper fund for the maintenance and education of the infant, and it is at the peril of the guardian or trustee if he exceed this. The fact that the income may be inadequate does not essentially vary the principle. The discretion to break into the corpus of the estate or fund is intrusted to the court, and denied to the trustee. Thus far the authorities may be said substantially to agree. But, according to some of the authorities, this general doctrine is subject to certain qualifications, one of which is that acts done by a guardian or trustee of his own authority, which clearly appear to the court on inquiry to have been beneficial to the infant, and such as the court on the application of the guardian would have ordered to be done, will be protected: *McPherson on Infants*, 337, margin, and cases cited in notes. On the other hand, it is held that the unauthorized acts of the guardian in breaking into the capital of the estate without the previous sanction of the court will not be protected or confirmed by the court. And this doctrine is maintained in the case of a trustee under a deed of trust, in *Hester v. Wilkinson*, 6 Humph. 215-219; 44 Am. Dec. 303; also *Phillips v. Davis*, 2 Sneed. 520-525; 62 Am. Dec. 472."

case as would have been necessary to obtain an order of the court allowing such excess of expenditures.¹ A guardian or parent may be reimbursed for necessary expenses incurred in the support of a ward and child before any order is made therefor by the court, and before the appointment of the guardian.² A ratification by the court as necessary and proper of expenditures made by a guardian is equivalent to a previous authorization.³ Where the estate is sufficient to furnish an income that will, with economy, maintain and educate the ward suitably, the guardian should not exceed the income without adequate reason, though, if circumstances justify it, he may look at future and probable resources, as well as at the present and actual income.⁴ Where one holds money as general guardian, and also as special guardian for the sale of the ward's land, expenses for the ward's maintenance, etc., which the guardian is entitled to charge, are not chargeable against the fund held as special guardian, so long as the other fund is sufficient to pay them.⁵ In cases of strong or sudden necessity, as for maintenance, medical attendance, and burial expenses, a guardian may encroach on the capital of the ward's estate without previous authority from the court.⁶ A ward's estate being insufficient for her support and education, her guardian expended thereupon the proceeds of her real and personal estate, it was held that the Virginia statutes confer upon the court no power to sanction this appropriation of the real estate, though had the guardian applied to the court in advance to authorize such application upon a proper case shown, leave would have been decreed. As to the personal estate the rule is otherwise, the court having power to sanction the action of the guardian.⁷

¹ *Holmes v. Logan*, 3 Strob. Eq. 31.

² *In re Besondy*, 32 Minn. 385; 50 Am. Rep. 579; *In re Miller*, 34 Hun, 267.

³ *Killpatrick's Appeal*, 113 Pa. St. 46.

⁴ *Gott v. Culp*, 45 Mich. 265.

⁵ *Smith v. Gummere*, 39 N. J. Eq. 27.

⁶ *Hobbs v. Harlan*, 10 Lea, 268; 43 Am. Rep. 309.

⁷ *Rinker v. Street*, 33 Gratt. 663.

"The order in which the ward's property should be expended for his support and education is as follows: First, the income of the property; next, if that proves insufficient, the principal of personal property; lastly, if both inadequate, the ward's real estate, or so much of it as is necessary. The ward's real estate can never be sold except under a previous order of court. Nor can a guardian use, in maintaining his ward, the proceeds of real estate sold for the purpose of reinvestment only, any more than he could have used the real estate itself. He should ask to sell for the purpose of maintenance."¹ If a guardian make a gratuity to this ward, he cannot afterwards charge the amount to him.² He is liable to be assessed personally for the taxes of the estate of his infant ward in his possession.³

ILLUSTRATIONS. — A will directed that a daughter of the testator should be sent to such a school "as would enable her to acquire the best education." By a prior clause, the testator directed the application of the income of the property therein given to the daughter to her schooling, clothing, etc. *Held*, that her guardian might, if necessary to give her the best education, exceed the income of the property so given: *Maclin v. Smith*, 2 Ired. Eq. 371. A ward was the niece of the wife of her guardian, and lived with him as one of the family, worked therein, and was boarded, clothed, and educated as one of his own children. The guardian frequently declared to her and others that he regarded her as one of his own children, and would do by her as his own. He never applied to the court for an allowance for her support, nor did it appear that he made any charge in his books for her maintenance. *Held*, that he was not entitled to a credit in his final account for her maintenance: *Horton's Appeal*, 94 Pa. St. 62. A ward was possessed of a small estate, and able to earn something towards his support, and resided with his mother, who could support him, and with his stepfather, who was his guardian. *Held*, that the latter should not be allowed to charge the estate of the ward with his maintenance: *Bradford v. Bodfish*, 39 Iowa. 681. A father was

¹ Schouler on Domestic Relations, 338, citing *Strong v. Moe*, 8 Allen, 126; *Rinker v. Street*, 33 Gratt. 663. See note to *Villard v. Robert*, 49 Dec.

Dec. 657; see also *Draper v. Joiner*, 9 Humph. 612; 49 Am. Dec. 719.

² *Pratt v. McJunkin*, 4 Rich. 5.

³ *Payson v. Tufts*, 13 Mass. 493.

appointed guardian of his child, and was authorized by the court to apply to the child's maintenance the interest of the fund. This he did not do, but supported the child himself. *Held*, that, after the guardianship had terminated, no allowance should be made for such maintenance: *Stigler v. Stigler*, 77 Va. 163. A guardian, before appointment, offered in the event of his appointment to maintain and educate the ward. The order for his appointment recited the offer. He subsequently presented a claim for board, clothing, and schooling. *Held*, that he was estopped from asserting such claim: *Barg's Estate*, Myrick's Probate, 69. G. was guardian of his children in respect to certain property which had been bequeathed to them by a relative. G. was a man of wealth, and maintained and educated his children at his own expense, making no charge against them. When G. died, his estate was ample, not only to pay off his indebtedness, but to leave a large surplus for his heirs. The estate, however, was rendered insolvent by losses incurred subsequent to G.'s death. On a bill by the creditors of G. against his administrator, *held*, that the guardianship account was not chargeable for the benefit of the creditors, with the cost of educating and maintaining the children: *Griffith v. Bird*, 22 Gratt. 73. A guardian took his ward to live with him, under agreement that he would support her as his own child. She rendered some service in the family, and he did not charge her for board in his books or in his first account. *Held*, that he could not be allowed for her board, washing, etc.: *Snover v. Prall*, 38 N. J. Eq. 207. A statute prohibits the guardian of an infant who has a father or mother from expending anything for the infant's support or education unless the court shall so order. *Held*, that even an expenditure which would have been authorized cannot be allowed if no order was made: *Ex parte George*, 63 Miss. 143.

§ 879. **Transactions between Guardian and Ward—Former a Trustee.**—During the existence of the guardianship, the relative situation of the parties imposes a general inability to deal with each other.¹ But courts of equity proceed yet further in cases of this sort. They will not permit transactions between guardians and wards to stand, even when they have occurred after the minority has ceased, and the relation becomes thereby actually ended, if the intermediate period be short,²

¹ Snell's Equity, 402.

21 Am. Dec. 594; *Wright v. Arnold*, 14

² *Waller v. Armistead*, 2 Leigh, 11; B. Mon. 638; 61 Am. Dec. 172.

unless the circumstances demonstrate the fullest deliberation on the part of the ward, and the most abundant good faith on the part of the guardian.¹ A court of chancery will not permit one standing in the relation of a guardian to place himself in an attitude of hostility to the interests of his ward, nor to derive any benefit to himself at their loss; and if a purchase by him of the property of the wards during the continuance of such relation can be permitted to stand under any circumstances, it will only be upon his showing clearly that he acted in the utmost good faith, that the price given was the full value, and that the transaction was for the benefit of the wards.² The sale of property by a guardian to his ward may be disaffirmed by the ward after he comes of age. The ward may ignore the sale and recover the price, and may also claim from his guardian interest upon the money thus invested.³ A gift to the guardian by the ward is voidable by him.⁴

Where, however, the influence as well as the legal authority of the guardian over the ward has completely ceased, and the ward has been put in possession of his property after a full and fair settlement of accounts, equity will not interfere to set aside a reasonable gift to the guardian.⁵ The guardian cannot reap any benefit from the use of the ward's money; nor can he make anything for himself out of any sale, purchase, or transaction in relation to the ward's property.⁶ He is never allowed to make money out of his ward; what is made must be accounted for.⁷ A guardian who buys in the land of his wards at a judicial sale, and afterwards sells the same,

¹ *Hatch v. Hatch*, 9 Ves. 267; *Smith v. Dibrell*, 31 Tex. 239; 98 Am. Dec. 526.

² *Mann v. McDonald*, 10 Humph. 275.

³ *Hendee v. Cleaveland*, 54 Vt. 142.

⁴ *Wade v. Pulsifer*, 54 Vt. 45.

⁵ *Hylton v. Hylton*, 2 Ves. Sr. 549.

⁶ *Dietterich v. Heft*, 5 Pa. St. 87; *Sparhawk v. Allen*, 21 N. H. 9; *Downs v. Richards*, 4 Del. Ch. 416; *Coffee v. Greenfield*, 62 Cal. 229; *Kepler v. Davis*, 80 Pa. St. 153.

⁷ *Eberts v. Eberts*, 55 Pa. St. 110; *Lee v. Fox*, 6 Dana, 171.

may be decreed to account to his wards for the difference between the price paid by him and the amount realized from the sale.¹ If a guardian subscribe to bank stock in the name of his ward, it belongs with all the proceeds to his ward on his reaching the age of twenty-one.² A ward may claim the profits realized by his guardian in any trade or business carried on with his money. He may also claim any specific article of property purchased with his money, although the guardian may have taken the title to himself.³ Where the guardian has made profits by the employment of the funds of the ward, the latter may elect to take the profits, or charge him with interest, but is not entitled to both.⁴ So if a guardian settles a debt on advantageous terms, the profit belongs to the ward.⁵

ILLUSTRATIONS.—At an executor's sale of land H. bid it in, and subsequently became the guardian of the child of the deceased owner of said land. H. receipted to the executor for the share of the proceeds of the sale coming to his ward, but no money was transferred, the executor crediting himself for it, and charging it to H., to whom he executed a deed of the land. *Held*, that H. and the sureties of his guardian's bond were liable to his ward for his share in the proceeds of the land: *Pfeiffer v. Knapp*, 17 Fla. 144. Under a verbal agreement with minor children, a person purchased their deceased father's farm for them at public sale. He declared his intention at the sale, and informed the children that it was for them. He was afterwards appointed their guardian. *Held*, that he was liable to account as guardian for any advance received on the sale of the farm: *Hayman's Appeal*, 65 Pa. St. 433. The Minnesota statute, section 41, provides that if a guardian making a sale of his ward's real estate shall, directly or indirectly, purchase or be interested in the purchase of any part of such real estate, such sale shall be void. *Held*, that the word "void" in the statute was used in the sense of voidable, and that the sales prohibited were void at the election, timely exercised, of those interested in the land

¹ *Hanna v. Spotts*, 5 B. Mon. 362; 43 Am. Dec. 132; *Ex parte Crump*, 16 Lea, 732.

² *Brisbane v. Bank*, 4 Watts, 92.

³ *Chanslor v. Chanslor*, 11 Bush, 663.

⁴ *Kyle v. Barnett*, 17 Ala. 306.

⁵ *White v. Parker*, 8 Barb. 48; *Clowes v. Van Antwerp*, 4 Barb. 416; *Kennard v. Adams*, 11 B. Mon. 102; *Jennings v. Lee*, 5 Ind. 257; *Lefevre v. Laraway*, 22 Barb. 168.

sold; but that such election could not be exercised against a *bona fide* purchaser: *White v. Iselin*, 26 Minn. 487.

§ 880. **Ratification by Ward—Acquiescence.**—The ward may ratify, after he becomes of age, an act of the guardian otherwise voidable, and it will then be binding on him.¹ A release to a guardian by his ward after becoming of age, with full knowledge of the facts, and in the absence of any undue means used on the part of the guardian to obtain it, is binding.² In the absence of any showing of fraud, a ward who for more than two years has acquiesced in a final settlement of the guardian's account is precluded from maintaining a bill to surcharge and falsify the same.³ An acceptance by a ward after coming of age, of the proceeds of sales by his guardian, and a discharge of the guardian and his sureties, is a ratification of the guardian's acts.⁴ Where a guardian makes a sale of property under a void decree of the court, if the ward after arriving at maturity receives the purchase-money, it will amount to a confirmation of the sale by the ward, and work an estoppel.⁵ A guardian's settlement has been held not impeachable after an acquiescence of seventeen years.⁶ Acts and words of acquiescence in a guardian's transactions, said and done by the ward after arriving of age, will not bind her unless done with a full knowledge of her rights and of the circumstances surrounding the transaction.⁷ A person is not concluded by a receipt given soon after coming of age to his former guardian, where it was given without a full

¹ *Brown v. Caldwell*, 10 Serg. & R. 114; 13 Am. Dec. 660; *Hoit v. Underhill*, 10 N. H. 220; 34 Am. Dec. 148; *Scott v. Freeland*, 7 Smedes & M. 409; 45 Am. Dec. 310; *Carpenter v. McBride*, 3 Fla. 292; 52 Am. Dec. 379. In Indiana, the same limitation applies to an action to set aside the final settlement of a guardian as to cases of final settlement by executors and administrators: *Briscoe v. Johnson*, 73 Ind. 573.

² *Kirby v. Turner*, Hopk. Ch. 309;

Kirby v. Taylor, 6 Johns. Ch. 242.

³ *High v. Snedicer*, 57 Ala. 403.

⁴ *Seward v. Didier*, 16 Neb. 58.

⁵ *Parmelee v. McGinty*, 52 Miss. 476; *Douglass v. Bennett*, 51 Miss. 680; *Deford v. Mercer*, 24 Iowa, 118; 92 Am. Dec. 460.

⁶ *Chorpenning's Appeal*, 32 Pa. St. 315; 72 Am. Dec. 789; *Morganstern v. Shuster*, 66 Md. 250.

⁷ *Trader v. Lowe*, 45 Md. 1.

knowledge of the facts.¹ A short delay by a ward after he had come of age to institute a suit against his guardian and his sureties for money due him does not discharge the sureties from obligation on the guardian's bond.² A guardian is not entitled to an absolute discharge and to have his bond delivered up and canceled immediately upon the ward's becoming of age, although the ward has settled with his guardian; but the ward is usually allowed one year to examine his guardian's accounts.³ Guardians are not protected in an improper or unsafe use of the assets by the consent of the ward given during minority.⁴

ILLUSTRATIONS.—A guardian and trustee sold his ward's land with her full knowledge and without objection; paid over to her the purchase-money; made his final settlement, which was approved; and the purchaser and his grantee held peaceable possession for seven years. *Held*, that said ward, who had failed to have her guardian's settlement set aside on the ground that said sale had been made while she was of age, could not recover the land: *Webster v. Bebinger*, 70 Ind. 9. A ward on arriving of age released her guardian under circumstances indicating fraud on his part. *Held*, that her delay thereafter for four years to attack the release was laches fatal to a recovery against his surety, although the guardian was insolvent: *Aaron v. Mendel*, 78 Ky. 427; 39 Am. Rep. 248. A bill in equity to set aside the settlement between a guardian and his ward, made shortly after the latter attained his majority, was brought by the ward nearly ten years after the settlement, and it appeared that the guardian was dead, and that prior to his death both had lived near each other on intimate terms, and had had business transactions with each other without any complaint by the ward as to the settlement. *Held*, that the delay was fatal to the bill: *Jackson v. Harris*, 66 Ala. 565. A husband on examining the settlement of his wife's estate made by her guardian approved the settlement, and filed a certificate to that effect in the county court. *Held*, that he thereby made himself a party to the settlement, and barred the right of the wife of setting aside the settlement after his death, except on the ground of fraud or mistake: *Bybee v. Tharp*, 4 B. Mon. 313. A guardian, having sold land devised to his ward, invested the proceeds in slaves, which, on her coming of age, she took possession of and

¹ *Brewer v. Vanardsdale*, 6 Dana, 204; *Hall v. Cone*, 5 Day, 543; *Fish v. Miller*, 1 Hoffm. 267.

² *Pfeiffer v. Knapp*, 17 Fla. 144.

³ *In re Van Horne*, 7 Paige, 46.

⁴ *In re Teyn*, 2 Redf. 306.

kept, and they were enjoyed by her and her husband during life. *Held*, that this change of property by the guardian was ratified by the acts of the ward: *Moore v. Moore*, 12 B. Mon. 651. A guardian had exceeded the ward's income in purchasing for him a horse and buggy, but the ward used them after his majority, and received the proceeds of their sale. *Held*, that there was a ratification of the purchase: *Caffey v. McMichael*, 64 N. C. 507. A ward on coming of age joined with her brothers, sisters, mother, and step-father in executing a release of a farm, etc., to her guardian, who was her eldest brother, in order to carry out a family arrangement of what had been done before. *Held*, that the release bound her: *Cowan's Appeal*, 74 Pa. St. 329. Minors were interested in a manufacturing establishment as beneficiaries under a deceased partner, and the administrator, who was also their guardian, without any fraud, but with entire good faith, allowed the business to be continued by the surviving partners for several years, without filing any inventory or account; and the property suffered no deterioration, but increased in value, and was then, by virtue of a special law, transferred to a corporation created for the purpose, and the beneficiaries, after that, for more than seven years subsequently to coming of age, received dividends on their share of the stock, and annual stated accounts. *Held*, that by reason of such acquiescence, they could not sustain a bill in equity for an account of the estate: *Hoyt v. Sprague*, 103 U. S. 613. A female ward after coming of age lived with her father on land mortgaged by him to her guardian. *Held*, that this did not ratify the wrongful act of the guardian in making the loan: *Winslow v. People*, 117 Ill. 152. An infant delayed for three years after majority to take any steps to set aside a settlement with his guardian, made two years before majority, whereby he received land worth only half his guardian's indebtedness. *Held*, not to bar an action taken immediately on advice of counsel: *Voltz v. Voltz*, 75 Ala. 555. A father, without taking out letters of guardianship, acted as the guardian of the estate of his daughter, received moneys in that character, and receipted for them in that character. *Held*, that lapse of time in analogy to the statute of limitations was no defense: *Pennington v. Fowler*, 7 N. J. Eq. 343.

§ 881. **Guardian must Give Bond, when.** — A probate guardian before receiving his appointment is obliged to give a bond with good security for the faithful performance of his trust.¹ Natural guardians are not required to

¹ Schouler on Domestic Relations, Ch. 314; *Carpenter v. Sloane*, 20 Ohio, 366; *Westbrook v. Comstock*, Walk. 327.

give bond, nor guardians in socage, nor testamentary guardians, because they are not appointed by the court, nor answerable to it. But in some states the testamentary guardian is treated like an executor, and must give bond,¹ unless the testator has exempted the giving of the bond by his will.² Trust funds should not be paid over to a guardian without security, even though he is the father, and is unable to give the security.³ Guardians, executors, and administrators who enter into a joint bond for the faithful performance of their duties are liable for the acts and defaults of each other, unless the bond itself shows that they did not intend to become bound for each other's defaults.⁴ A statute requiring a bond from a guardian empowered to sell his ward's property is not satisfied by the giving of a mere undertaking.⁵ An unproductive suit on a guardian's bond will not operate as an estoppel upon the wards for the recovery of the property, or its value, from a third party who appropriated it after knowledge that it belonged to the wards.⁶

§ 882. Form and Requisites of Bond.—The bond usually recites the appointment, and binds the guardian to make a true inventory of the estate which shall come into his possession or knowledge; to manage the property according to law and the best interests of the ward; to discharge his trust faithfully; to render regular accounts to the court; to make due settlement with the ward or other person appointed at the termination of the trust. As to the person of the ward, it stipulates for a faithful discharge of duties as to custody, education, and maintenance; but where the ward is an adult insane person or spendthrift, for custody and maintenance only.⁷ A guar-

¹ Schouler on Domestic Relations, 367.

² Schouler on Domestic Relations, 367.

³ Savage v. Olmstead, 2 Redf. 478.

⁴ Williams v. Harrison, 19 Ala. 277.

⁵ Goldsmith v. Gilliland, 23 Fed. Rep. 645.

⁶ Branchi v. Du Bose, 55 Ga. 21.

⁷ Schouler on Domestic Relations, 366.

dian's bond is valid and binding, although its conditions are not according to the requirements of the statute, if it provides in general terms for the faithful execution and discharge of the office of guardian according to law.¹ Failure to recite the guardian's appointment in the condition does not vitiate it;² nor the fact that there was left a blank for the initials of the wards' names;³ nor the fact that it is delivered to the judge on the day before his appointment.⁴ The bond of a guardian to sell the real estate of an infant is not necessarily void because signed and acknowledged previously to the granting of the order appointing him. It is sufficient if, from the approval and filing, the delivery appears to have occurred after the granting of the order; the bond takes effect from the delivery.⁵ If the sureties sign the bond, it is not essential to their liability that the guardian should have also signed.⁶ Statutory bonds superadding conditions contrary to statute, or not required by it, to those which are required, are void as to the former, but valid as to the latter, unless made wholly void by the statute expressly or by necessary implication.⁷ So a bond omitting material parts of statutory conditions is valid as to what remains.⁸ A bond given by a guardian, though not conforming to the statute, is valid, so far as it embodies the statutory policy, as a voluntary obligation.⁹ Where a bond was void at law, on the ground that the sureties were justices of the county, and therefore both obligors and obligees, the bond was enforced in equity.¹⁰ A recital in a guardian's bond of the fact that he is such guardian is binding both upon himself and upon his surety in an action on the bond.¹¹ The court

¹ Probate Court v. Strong, 27 Vt. 202; 65 Am. Dec. 190.

² Pratt v. Wright, 13 Gratt. 175; 67 Am. Dec. 767.

³ Turner v. Alexander, 41 Ark. 254.

⁴ Vincent v. Starks, 45 Wis. 458.

⁵ Center v. Finch, 22 Hun, 146.

⁶ Palmer v. Oakley, 2 Doug. (Mich.) 432; 47 Am. Dec. 41.

⁷ Pratt v. Wright, 13 Gratt. 175; 67 Am. Dec. 767.

⁸ Pratt v. Wright, 13 Gratt. 175; 67 Am. Dec. 767.

⁹ Ordinary v. Heishon, 42 N. J. L. 15.

¹⁰ Butler v. Durham, 3 Ired. Eq. 598.

¹¹ Fridge v. State, 3 Gill & J. 103; 29 Am. Dec. 463.

may relax the rule in relation to the amount in which a guardian and his sureties are required to justify, where the estate of the infant is very large.¹ Where a wife is appointed a guardian, her husband should be taken as her sole bondsman only when his peculiar resources are ample.² Suit may be instituted on a guardian's bond in Maryland before the infant attains his majority, because the state is the legal plaintiff, and the infant is merely the *cestui que use*.³

ILLUSTRATIONS.—An order of court was made that a guardian give new sureties before a certain day, or that the guardianship be revoked; the guardian gave bond, with one surety only, but after the time fixed by the order. *Held*, that the guardian and surety were estopped from denying that the guardianship subsisted at the time of giving the bond: *Field v. Pelot*, 1 McMull. Ch. 369. Before the appointment of a guardian, his bond was presented in court, and, the surety not being sufficient, was returned. Two additional sureties were obtained, and the court pronounced them satisfactory, saying, "That is all right." The bond was left with the judge by the party's attorney. Before the appointment of the guardians, one of the sureties died. *Held*, there was no delivery of the bond: *Brooks v. People*, 15 Ill. App. 570. A, the guardian of a minor, not wishing to retain the guardianship, the minor selected B, and the judge of probate made a decree appointing B guardian, he giving bond as the law directs, and a letter of guardianship was made out in the probate office, indorsed, "To be delivered to B when bond is filed." B assumed to act as guardian, but never filed a bond nor received the letter of guardianship, and no decree was passed discharging A from the trust. *Held*, that B was not the legal guardian, but that the office continued in A: *Fay v. Hurd*, 8 Pick. 528.

§ 883. **Extent of Liability of Guardian on Bond.**—The bond renders the guardian liable for all the estate of the ward which comes to his possession or knowledge.⁴ It covers property without the jurisdiction.⁵ No action can be maintained against a guardian or his sureties on

¹ *In re Hedges*, 1 Edw. 57.

² *Ex parte Maxwell*, 19 Ind. 88.

³ *Fridge v. State*, 3 Gill & J. 103; 20 Am. Dec. 463.

⁴ *Schouler on Domestic Relations*, 367.

⁵ *McDonald v. Meadows*, 1 Met. (Ky.) 507.

the official bond whilst the relation of guardian and ward subsists;¹ nor until after proceedings to ascertain the amount due on the guardianship accounts.² His settlement and discharge cannot be attacked; they are *res adjudicata*.³ Where a guardian illegally sells and transfers the property of his ward contrary to law, without previous order of court, and converts the proceeds to his own use, it is no answer to an action on his bond by the ward, that under the law the sale itself is void, and passed no title to the purchaser.⁴ Several distinct breaches of a guardian's bond may be joined in one complaint.⁵ Damages cannot be assessed beyond the penalty of the bond.⁶

ILLUSTRATIONS. — A guardian illegally transfers corporate stock standing in the name of the ward, without order of court, and converts the proceeds to his own use. *Held*, that the ward is not confined to his action on the guardian's bond, but has the cumulative remedy against the corporation. He may repudiate the transfer as void and recover the stock: *State v. Bishop*, 24 Md. 310; 87 Am. Dec. 608.

§ 884. **Extent of Liability of Sureties.** — The sureties, like the guardian, are liable for all property which comes to the guardian's possession or knowledge.⁷ The sureties' liability does not cease with the death or resignation of the guardian; they continue liable for the estate in his hands at the time.⁸ They are liable for moneys in the guardian's hands at the time of the execution of the bond, though received previously, as well as for moneys subse-

¹ *Eiland v. Chandler*, 8 Ala. 781.

² *Hunt v. White*, 1 Ind. 105; *State v. Strange*, 1 Ind. 538; *Stilwell v. Mills*, 19 Johns. 304; *Salisbury v. Van Hoesen*, 3 Hill, 77; *Barrett v. Monroe*, 4 Dev. & B. 194. A ward need not delay suit upon his guardian's bond until final settlement in the probate court, but may sue upon attaining his majority, if the amount due him is not then paid: *State v. Roeper*, 9 Mo. App. 21.

³ *State v. Slaughter*, 80 Ind. 597.

⁴ *State v. Bishop*, 24 Md. 310; 87 Am. Dec. 608.

⁵ *Richardson v. State*, 55 Ind. 381.

⁶ *In re Wilson*, 38 N. J. Eq. 205.

⁷ *Mattoon v. Cowing*, 13 Gray, 389; *Neill v. Neill*, 31 Miss. 36; *McClendon v. Harlan*, 2 Heisk. 337; *Bond v. Lockwood*, 33 Ill. 212; *Williams v. Morton*, 38 Me. 47; 61 Am. Dec. 229; *Hunt v. State*, 53 Ind. 321.

⁸ *Moore v. Wallis*, 18 Ala. 458; *Ashby v. Johnston*, 23 Ark. 163; 79 Am. Dec. 102; *State v. Thorn*, 28 Ind. 306; *Jones v. Hays*, 3 Ired. Eq. 502; 44 Am. Dec. 78.

quently collected.¹ But they are not liable for what he receives after he resigns his office.² Sureties are responsible to an administrator for money which if paid to the wards would have to be returned by them to the administrator to pay debts of the deceased.³ They cannot set up in defense during the latter's minority that the guardian and ward have together squandered the estate. The consent or co-operation of the ward, while under age, is no excuse for misappropriation.⁴ A guardian who accepts from his predecessor in the trust an uncollectible note, payable to such predecessor in his individual capacity, is liable, as are the sureties on his bond, for the amount.⁵ If a female guardian marries, and under a mistaken belief that the marriage dissolves the relation of guardian and ward, abandons her right to the custody of the ward's estate, her sureties remain responsible for the estate then in her hands, and for whatever other moneys or estate of ward should have been collected and taken care of by her as such guardian thereafter.⁶ Where a guardian converts his ward's money prior to giving a bond, and subsequently he replaces it, his sureties are liable if he fails to account for the money so replaced.⁷

The guardian's giving a second bond does not release the sureties on the first.⁸ Where new sureties are given, they become liable for breaches of the bond before they become sureties, as well as for subsequent breaches.⁹ Where a surety is discharged, this does not release him from any liability which has accrued on the bond at the time of the discharge.¹⁰ Where the guardian of an infant is

¹ *McDowell v. Caldwell*, 2 *McCord* Ch. 43; 16 *Am. Dec.* 635.

² *Merrells v. Phelps*, 34 *Conn.* 109.

³ *Wilson v. Soper*, 13 *B. Mon.* 411; 56 *Am. Dec.* 574.

⁴ *Probate v. Cook*, 57 *N. H.* 450.

⁵ *State v. Greensdale*, 106 *Ind.* 364; 55 *Am. Rep.* 753.

⁶ *Cotton v. Wolf*, 14 *Bush*, 238.

⁷ *Parker v. Medaker*, 80 *Ind.* 155.

⁸ *Jones v. Blanton*, 6 *Ired. Eq.* 115; 51 *Am. Dec.* 415; *Douglass v. Keseler*, 57 *Iowa*, 63.

⁹ *Bryant v. Owen*, 1 *Ga.* 335; *Justices v. Woods*, 1 *Ga.* 84; *Armstrong v. State*, 7 *Blackf.* 81; *Bell v. Jasper*, 2 *Ired. Eq.* 597; *Field v. Pelot*, 1 *McMull. Eq.* 369; *Steele v. Reese*, 6 *Yerg.* 263.

¹⁰ *Justices v. Woods*, 1 *Ga.* 84; *Bryant v. Owen*, 1 *Ga.* 355.

required to execute two bonds in different courts, the one for the management of the personal the other the real estate of the infant, the sureties on the two bonds must be regarded as joint sureties, each being liable to the infant for the whole amount, and each having the right of contribution as against the other.¹ An additional bond given by a guardian on the sale of his ward's real estate is an independent undertaking, and suit may be brought upon it whenever it is broken, without having first resorted to the original bond of the guardian. Such bond is not discharged by the fact that on reporting the sale, the guardian produced the proceeds thereof in court, and then withdrew them by order of the court; it can only be discharged by the actual payment of the moneys arising from the sale, according to law, to the ward, or other person entitled to receive the same.² The general rule that sureties on a bond are not liable for the past defaults unless in terms made so applies where different bonds are given during the same term of office as well as where they are given under successive appointments.³ A substituted surety on a guardian's bond is liable for money before received by the guardian from the sale of real estate of his ward.⁴

For the misconduct of the guardian or his defaults, suit may be brought on the bond either by the ward or by creditors.⁵ The ward may maintain a bill against the guardian alone, without joining the sureties, to compel a settlement of the guardianship; and the sureties may intervene by petition to protect their interests, if they desire to do so; but whether they intervene or not, the decree is binding and conclusive on them, in the absence of fraud, and will support an action at law against them on the guardian's bond.⁶ Sureties may be sued without

¹ *Elbert v. Jacoby*, 8 Bush, 542.

² *State v. Steele*, 21 Ind. 207; 83 Am. Dec. 346.

³ *State v. Jones*, 89 Mo. 470.

⁴ *Tuttle v. Northrop*, 44 Ohio St. 178.

⁵ *Schouler on Domestic Relations*, 376.

⁶ *Hailey v. Boyd*, 64 Ala. 399.

first suing the guardian,¹ or the guardian and sureties may be joined in the same suit.² The sureties are liable for money imprudently loaned by the guardian.³ Where on the order for sale of real estate a special bond is given, and the guardian does not account for the money realized, the sureties on the special bond, and not those on the general bond, are liable.⁴ In the absence of fraud, the sureties on a guardian's bond are concluded by the final settlement had between guardian and ward in the probate court.⁵

ILLUSTRATIONS.—A surety on a guardian's bond obtained his release, and the guardian, resigning his trust, obtained letters of guardianship in another county, gave his bond, and made a report charging himself with a certain sum as belonging to his ward. *Held*, that the surety was not released from liability for the guardian's defalcation prior to these proceedings: *Yost v. State*, 80 Ind. 350. A was appointed guardian of an infant in Tennessee. The infant's whole estate consisted of a fund held by his guardian in another state. A received this fund upon his application, and inventoried it. *Held*, that the sureties upon his bond were responsible for the fund: *Pearson v. Dailey*, 7 Lea, 674. A guardian gave a bond with sureties. While the bond was in force he misappropriated his ward's money. Afterwards he renewed his bond, but with other sureties. *Held*, that the sureties upon the bond last given were liable for the default before those on the first bond: *Crook v. Hudson*, 4 Lea, 448. Sureties on the bond of T., a guardian, to faithfully account for the management of the ward's estate, and "in all respects perform the duty of guardian, *held*, not to be liable for T.'s failure to account for the value of property of the ward converted by T. to his own use before execution of the bond: *State v. Shackelford*, 56 Miss. 648. In the settlement of a guardian's account he was credited with the payment of moneys for his ward, which in fact had not been paid, and the amount was subsequently corrected during the minority of the ward. *Held*, that the liability of the surety in the guardian's bond was not af-

¹ *State v. Strange*, 1 Ind. 538.

² *Hutchcraft v. ShROUT*, 1 T. B. Mon. 206; 15 Am. Dec. 100.

³ *Richardson v. Boynton*, 12 Allen, 138; 90 Am. Dec. 141.

⁴ *Williams v. Morton*, 38 Me. 47; 61 Am. Dec. 229; *Blauser v. Diehl*, 90 Pa. St. 350; *Handerson v. Coover*,

4 Nev. 429; *Potter v. State*, 23 Ind. 607; *Brooks v. Brooks*, 11 Cush. 22; *Fay v. Taylor*, 11 Met. 529; *Madison Co. v. Johnson*, 51 Iowa, 152. But see *Commonwealth v. Loyd*, 12 Phila. 221.

⁵ *Braiden v. Mercer*, 44 Ohio St. 339.

fect: *Scobey v. Gano*, 35 Ohio St. 550. A guardian failed to loan money derived from the sale of his ward's real estate when he had the opportunity of doing so on good security. The conversion of such money by him, and his failure to pay and account for the same, *held*, to constitute a breach of his bond, which recited that he had been ordered to sell said real estate, and was conditioned that he should faithfully discharge the duties of his trust according to law: *Cogswell v. State*, 65 Ind. 1. A guardian licensed to sell real estate of his ward for the purpose of investment did not duly invest the proceeds, but charged himself with such proceeds, and with interest thereon from year to year, in his general guardianship account, which was allowed by the court of probate, and expended sums equal to such interest for the support of his ward. *Held*, that he was responsible for such proceeds upon the special bond given by him on obtaining the license; but for the interest thereon upon his general bond: *Mattoon v. Cowing*, 13 Gray, 387. A guardian, before his appointment, obtained possession of the ward's property and disposed of of it. In his account he charged himself with its proceeds as so much money on hand. *Held*, that the sureties on his bonds were liable for the amount: *Sargent v. Wallis*, 67 Tex. 483. One of three sureties in a guardian's bond moved for counter-security, and was released by the county court upon the guardian's executing a new bond with two sureties. *Held*, that the two other sureties in the first bond still remained liable jointly with the sureties in the new bond: *Boyd v. Gault*, 3 Bush, 644. A guardian had wasted the estate before the giving of new sureties. *Held*, that the original sureties were liable, notwithstanding the demand for the wasted funds was not made until after the new sureties had been given: *In re Conover*, 35 N. J. Eq. 108. A guardian bought property for himself at the administrator's sale of the estate of his ward's father, giving bond therefor to the administrator, who afterwards surrendered the bond, the guardian receipting therefor as so much money paid his ward, under the impression that the ward was entitled to some of the estate as distributee, but the estate proved insolvent. *Held*, that the surety on the guardian's bond was liable for non-payment of the amount receipted for: *State v. Womack*, 72 N. C. 397. A guardian lent his ward's money to the firm of which the guardian was a member. After this the guardian gave a new bond. For a long time afterwards, the firm was solvent, but at last it became insolvent, and the money was lost. *Held*, that the sureties on the bond were liable, notwithstanding that the loan was originally made before they became so: *McWilliams v. Norfleet*, 63 Miss. 183. A guardian's bond was signed by but one surety, and was approved, the ordinary practice of the surrogate's office, however, requiring two sureties. There was nothing to indicate

that the bond was not to become operative until signed by another surety, although such was the understanding between the surety and the principal. *Held*, that the surety could not avoid liability: *Bangs v. Bangs*, 41 Hun, 41.

§ 885. **When and for What Sureties not Liable.** — The sureties are not liable for property unlawfully received by the guardian;¹ nor for work and labor done by the ward for the guardian;² nor for the non-payment of a note given by the guardian, and signed by him as guardian, for the board and tuition of his ward.³ The sureties on a guardian's bond conditioned for the future faithful performance of the guardianship, but not extending to indemnify the ward for previous default of the guardian, are not liable for such previous default.⁴ The heirs of a deceased surety on a guardian's bond are not liable jointly with the principal on the bond.⁵ If a ward after majority fails for an unreasonable time to bring suit on his guardian's bond, the sureties are thereby discharged.⁶ The equities of the surety in a guardian's bond are wholly derivative; he can make only the same defenses to the ward's action that his principal would be entitled to make.⁷

ILLUSTRATIONS. — A guardian accepted the note of administrators in payment of the ward's share of the estate. *Held*, that their sureties were not liable to the ward upon non-payment of the note: *Hubbard v. Ewing*, 4 Baxt. 404. Before confirmation of a guardian's sale of his ward's land, the sureties on his original bond were released and a new bond taken. *Held*, that they were not liable after confirmation for the money received by the guardian before confirmation, though at the time of its reception they had not been released: *State v. Cox*, 62 Miss. 786. Money had been inadvertently paid to a guardian on account of his ward, and he was afterwards

¹ *Livermore v. Bemis*, 2 Allen, 394; *Ballard v. Brummitt*, 4 Strob. Eq. 171;

Allen v. Crosland, 2 Rich. Eq. 68.

² *Phillips v. Davis*, 2 Sneed, 520; 62 Am. Dec. 472.

³ *McKinnon v. McKinnon*, 81 N. C. 201.

⁴ *Sebastian v. Bryan*, 21 Ark. 447.

⁵ *Strickland v. Holmes*, 77 Me. 197.

⁶ *Vermilya v. Bunce*, 61 Iowa, 605.

⁷ *Hughart v. Spratt*, 78 Ky. 313.

unable to pay back the same. *Held*, that his surety was not liable, as the case was not included in the covenants of the bond: *Ballard v. Brummitt*, 4 Strob. Eq. 171. A testator bequeathed property to his minor daughter at her marriage or when she should attain her majority, and if she should die before that time, then to his wife. *Held*, that the legacy, except the interest thereon, was not payable to the guardian of the daughter so long as she remained under age and unmarried, and that if paid to him, his sureties on his guardianship bond would not be liable therefor: *Allen v. Crosland*, 2 Rich. Eq. 68. A ward drew an order on his guardian payable to a third person, which was accepted by the guardian and left in his hands. The guardian showed such order to his sureties, representing that it was paid. *Held*, that this did not discharge the sureties to the extent of the order, unless it was shown that the ward participated in the fraud: *Bond v. Ray*, 5 Humph. 492.

§ 886. The Inventory.—It is the duty of the probate guardian on taking possession to at once file an inventory of the ward's effects. This shows throughout the guardianship the amount of assets which originally came into his hands. As others come in, he should add them to the inventory.¹ In New York, where a guardian committee or receiver neglects to file an inventory or account in compliance with the rules of the court, an order will be made requiring the inventory or account to be filed within twenty days after the service of a copy of the order upon him personally, or at his residence in case of absence, and to pay the expense of the order and proceedings thereon, or that an attachment issue against him.²

ILLUSTRATIONS.—A guardian was indebted to his ward's estate for money received from it prior to his appointment as guardian. *Held*, that such indebtedness must be entered in his inventory as a part of the ward's estate: *Neill v. Neill*, 31 Miss. 36.

§ 887. Compensation of Guardian.—For his services the guardian is allowed a fair compensation.³ In some

¹ Schouler on Domestic Relations, 375; *Knowlton v. Bradley*, 17 N. H. 370. 458; 43 Am. Dec. 609; *McNickle v.*

² *In re Seaman*, 2 Paige, 409.

³ Schouler on Domestic Relations,

Henry, 9 Phila. 243.

states, the court may allow what it thinks just and reasonable. In others, a commission on the moneys is allowed, varying in particular cases from one to ten per cent.¹ In New York, guardians, like other trustees, are allowed five per cent on sums not exceeding one thousand dollars, half that amount up to five hundred thousand dollars, and one per cent on all sums above that amount.² A guardian is entitled to such reasonable compensation as the circumstances warrant, such as the size and character of the estate, the amount and kind of his services, the duration of the trust, the obligation to maintain an oversight of the person.³ It is not an inflexible rule that the commissions of the guardian cover everything which can be allowed him for his services respecting the estate of his ward.⁴ A guardian is not bound to go beyond the limits of the state in the execution of the trust, and upon doing so, is entitled to extra compensation.⁵ A guardian who had used some of the trust moneys in his own business, and expecting to pay no interest thereon, had charged no commissions, was allowed his commissions on being charged with the interest.⁶ A guardian is entitled to commissions on payments made for goods bought of a firm of which he was a member, but not on charges for board while his ward lived in his family.⁷

But it has been held that the guardian cannot be allowed any compensation beyond his statutory commissions for services rendered the estate,—not even for his personal services as a mechanic in making repairs to the buildings on the estate under the order of the surrogate.⁸ He is not entitled to commissions on money col-

¹ *In re Harland*, 5 Rawle, 323; *Walton v. Erwin*, 1 Ired. Eq. 136; *Armstrong v. Walkup*, 12 Gratt. 608; *Holcombe v. Holcombe*, 13 N. J. Eq. 415; *Covington v. Leake*, 65 N. C. 594.

² *Schouler on Domestic Relations*, 373.

³ *Gott v. Culp*, 45 Mich. 265; *State v. Foy*, 65 N. C. 265.

⁴ *Morgan v. Morgan*, 39 Barb. 20.

⁵ *Huson v. Wallace*, 1 Rich. Eq. 1.

⁶ *Rapalje v. Norsworthy*, 1 Sand. Ch. 399.

⁷ *Williamson v. Williams*, 6 Jones Eq. 62.

⁸ *Morgan v. Hanna*, 13 Abb. Pr., N. S., 361.

lected and used by him in his own business, nor on debts of his ward paid to a firm of which the guardian is a member.¹ He will not be allowed compensation for taking care of the trust fund while he himself is the borrower of it.² A guardian who is also a counselor at law cannot charge his ward's estate for professional services, but is restricted to the statutory allowance of a guardian. No order of a surrogate fixing and allowing or ratifying and affirming such extra charge will legalize it.³ A guardian should be allowed no compensation where he has neglected his duties and done his ward positive wrong.⁴ A guardian removed cannot claim compensation for services.⁵ An appellate court will not review the finding of a referee as to the commissions allowed a guardian, unless such commissions are shown to be grossly erroneous.⁶

ILLUSTRATIONS. — A guardian in a trust of considerable duration performed his duties, except in a failure regularly to pass accounts; he, however, promptly answered, threw no obstacles in the way of investigation, and rendered a general account in his answer to a bill filed against him. *Held*, entitled to a commission of seven and one half per centum: *Magruder v. Darnall*, 6 Gill, 269. A guardian had simply received from the receivers of an estate a certain sum of money, and had paid it over to his ward without further trouble. *Held*, that an allowance of nearly three per cent was sufficient compensation for his services: *Holcombe v. Holcombe*, 13 N. J. Eq. 415.

§ 888. Suits against Guardian by Ward and Ward by Guardian. — After the guardianship has expired, an action of account lies by the ward against the guardian.⁷ In chancery, the ward during the guardianship may file a bill against the guardian for an account.⁸ As to probate

¹ *Burke v. Turner*, 85 N. C. 500.

² *Farwell v. Steen*, 46 Vt. 678.

³ *Morgan v. Hannas*, 49 N. Y. 667.

⁴ *Reed v. Ryburn*, 23 Ark. 47; *McCahan's Appeal*, 7 Pa. St. 56. A guardian by failing to make return does not forfeit his commission: *Baker v. Lafitte*, 4 Rich. Eq. 392.

⁵ *Trimble v. Dodd*, 2 Tenn. Ch. 500.

⁶ *State v. Foy*, 71 N. C. 527.

⁷ *Schouler on Domestic Relations*, 382.

⁸ *Schouler on Domestic Relations*, 382.

guardians, however, a simpler method is provided by statute, in permitting the ward to call the guardian to account at any time, in having him removed if he is unfaithful, and in holding him personally and his bondsmen liable for what he owes.¹ An action to recover money due an infant must be brought in the name of the infant by his guardian; the guardian cannot sue in his own name.² A ward, after coming of age, cannot prove, against the estate in insolvency of his guardian, a claim for the property which came into the hands of the guardian until the latter has settled his account in the probate court, or until a judgment has been obtained upon his bond.³ The guardian is estopped from denying the legality of his appointment, or the jurisdiction of the court making it, when he has accepted the appointment.⁴ A ward by his next friend may sue a guardian for assault and battery.⁵ A ward may, through her *prochein ami*, maintain a bill in equity to set aside an unlawful conveyance of her property by her guardian.⁶ After a ward becomes of age, he stands in the relation of creditor to his guardian. His cause of action is then complete; and if he fails to bring suit within the time limited by statute thereafter, the claim is barred.⁷ *Assumpsit* is not maintainable by ward against guardian or *quasi* guardian, the parent, the remedy being properly by action of account or bill in equity, in which the equities between the parties may be adjusted and rightfully settled.⁸ A ward may file a bill in equity to recover such part of his estate as he can trace, without instituting any proceedings at law,

¹ Schouler on Domestic Relations, 382.

² Fox v. Minor, 32 Cal. 111; 91 Am. Dec. 566. The guardian of an infant appointed by probate court is not trustee of express trust within the meaning of the California practice act: Fox v. Minor, 32 Cal. 111; 91 Am. Dec. 566.

³ Murray v. Wood, 144 Mass. 195.

⁴ Fox v. Minor, 32 Cal. 111; 91 Am. Dec. 566.

⁵ Schouler on Domestic Relations, 391. In Mason v. Mason, 19 Pick. 506, it was held that a spendthrift under guardianship could not sue.

⁶ Johnson v. Jones, 41 Ga. 596.

⁷ Coleman v. Willi, 46 Mo. 236.

⁸ Linton v. Walker, 8 Fla. 144; 71 Am. Dec. 106.

where the estate of his guardian is insolvent and his sureties irresponsible.¹

A ward who has arrived at age may sue his guardian on his bond for failure to pay over the ward's money, without first obtaining his removal.² A curator, before final settlement, cannot be sued by his ward for money had and received; the suit must be brought upon the bond.³ In a bill by infants against their guardian for an account and payment, it being shown in the cause that the guardian is wholly unfit for the office, the court may appoint a receiver to collect and receive the property of the wards, and require the guardian to pay over to him the money of his wards in his hands, and to transfer and deliver to him the property of the infants.⁴ To compel the filing of a deceased guardian's account, a new guardian should be appointed. A next friend cannot institute proceedings.⁵ In the final settlement of the account of a guardian before the orphans' court, an allowance cannot be made to the ward for labor while employed for the guardian.⁶ Until the relation of guardian and ward is determined, no right of action accrues to the guardian against the ward for advances.⁷ A guardian cannot recover of his ward, during the guardianship, for necessities furnished by him, although he has no property of the ward in his possession.⁸ An action for money had and received may be maintained by a former guardian against his ward, where the former sold the land of the latter, but the sale was subsequently set aside as void, in an action by the ward, although the guardian had accounted for the proceeds of such sale, and had his account settled by a decree of the probate court.⁹

¹ *Hill v. McIntire*, 30 N. H. 410; 75 Am. Dec. 229.

² *Stroup v. State*, 70 Ind. 495.

³ *Garton v. Botts*, 73 Mo. 274.

⁴ *Sage v. Hammonds*, 27 Gratt. 651.

⁵ *In re Stewart*, 12 Phila. 8.

⁶ *Bass v. Cook*, 4 Port. 490.

⁷ *Davis v. Ford*, 7 Ohio, part 2, 104.

⁸ *McLane v. Curran*, 133 Mass. 531;

43 Am. Rep. 535.

⁹ *Burleigh v. Bennett*, 9 N. H. 15;

31 Am. Dec. 213.

ILLUSTRATIONS.—A guardian accounted for and paid over to his wards all the profits of lands descended to them during the life of his wife, who was entitled to dower in the lands; and after her death, on a bill by one of the wards and her husband to falsify and surcharge his account, he claimed to be allowed one third of the profits of the land during his wife's life. *Held*, that the guardian, having paid over all the profits with a full knowledge of his rights, could not recover them back: *Lee v. Stuart*, 2 Leigh, 76; 21 Am. Dec. 599.

TITLE VII.

EXECUTORS AND ADMINISTRATORS.

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CHAPTER XLVIII.

EXECUTORS AND ADMINISTRATORS.

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§ 889. Appointment — Authority, how Derived — Delegation of Authority. — An executor is the creation solely of the testator, who may not only personally appoint him, but his power to appoint extends into the future, to be exercised after his death, to the extent that he may, by an agent, select a proper person as executor, and may also specially designate, not only the agent to appoint by name, or by the office held by him, but he may resort to any other method of certain identification of said agent.¹ The rights, powers, and duties of an executor may be either expressly or impliedly conferred under the will, and when so conferred, they amount to an appointment.² The authority to act, however, is derived from the judgment of a court of competent jurisdiction, which grants the letters, and it becomes effective upon the executor taking the oath of office and giving bond, if one is required.³

ILLUSTRATIONS. — A testator appointed his wife executrix of his will, and requested that "such male friend as she may desire shall be appointed with her as co-executor." *Held*, that such delegation of power to appoint was valid: *Hartnett v. Wandell*, 60 N. Y. 346; 19 Am. Rep. 194.

§ 890. When Letters may be Taken out. — Administration will be granted on an estate where there are debts due from it, notwithstanding the only assets are real property.⁴ Assets are not a necessary prerequisite to a grant.⁵ So letters will be granted where the property has been sold, and those of the heirs who are of age have accepted unconditionally.⁶ But it has been held that administration is not necessary to be taken out on the estate of an infant intestate.⁷ Though where a deceased

¹ *Bishop v. Bishop*, 56 Conn. 208, 210; citing *State v. Rogers*, 1 Houst. 569; *Jackson v. Paulet*, 2 Robt. 344; *In Goods of Cringam*, 1 Hagg. Const. 548; *In Goods of Deichman*, 3 Curt. 123.

² *Myers v. Daviess*, 10 B. Mon. 394; *Carpenter v. Cameron*, 7 Watts, 51;

Grant v. Spann, 34 Miss. 294; *Minn v. Owens*, 2 Strob. 101.

³ *Succession of Vogel*, 20 La. Ann. 81.

⁴ *Little v. Sinnett*, 7 Iowa, 324.

⁵ *Wheat v. Fuller*, 82 Ala. 572.

⁶ *Dees v. Tildon*, 2 La. Ann. 412.

⁷ *Cobb v. Brown*, *Spears Ch.* 564.

infant was one of several brothers and sisters, it was decided that it was necessary to take out letters of administration in order to enable the surviving brothers to maintain a suit for the recovery of personal property of which the infant had died possessed.¹ There is no necessity of two administrations being granted upon the same property left by a husband and wife who died at about the same time, and who owed only community debts, where such property must have been equally liable for such debts in the hands of an administrator of either or both of said decedents.² A survivor of two executors named in a will may take out letters at any time before an administrator is appointed, although he had renounced the trust, and the deceased executor only had accepted.³ So an administrator will not be appointed by reason of the mere fact that the executor appointed under the will is absent from the state. An administrator will not ordinarily be appointed where a will exists which designates some person to act, unless it appears that there is some actual legal disability which disqualifies the executor named;⁴ or, in brief, to warrant the appointment of an administrator, two things are necessary prerequisites, viz., death and intestacy.⁵ It also appears by a recent decision that probate may be had of lands at any time after the testator's decease.⁶ In addition to the prerequisites of death and intestacy, the rule is, that even if the deceased is testate, but has named no executor, or if an executor is named but refuses to qualify, any suitable person may be appointed administrator *cum testamento annexo*.⁷

¹ Miller v. Eatman, 11 Ala. 609.

² Soye v. McCallister, 18 Tex. 80; 67 Am. Dec. 689.

³ Perry v. De Wolf, 2 R. I. 103.

⁴ Griffith v. Frazier, 8 Cranch, 9.

⁵ Jochumsen v. Suffolk Savings Bank, 3 Allen, 87; Bulkley v. Redmond, 2 Bradf. 281; Schouler on Ex-

ecutors and Administrators, sec. 91; and see herein, *post*, secs. 898 and 899. As to inhabitancy, see Bloom v. Burdick, 1 Hill, 130; 37 Am. Dec. 299; see also herein, *post*, sec. 891.

⁶ Haddock v. R. R. 146 Mass. 155.

⁷ Smith v. Wingo, 1 Rice, 287; Suttle v. Turner, 8 Jones, 403.

§ 891. **Where Granted.** — The law is well settled that a grant of administration is governed by the *lex loci sitæ*.¹ So in Georgia it is held that administration will not be granted where the intestate had no property within the state, and was not a citizen thereof.² But in Virginia it was held in a similar case that such grant of letters was not void.³ Such appointment may also be made, although the deceased is a non-resident, where there is real property in the state where letters are granted.⁴ It would seem that assets within the state are necessary to warrant an appointment in case the intestate was a non-resident;⁵ although residence at the decease of a party, rather than the situation of the estate, is said in California to be the test as to the grant of administration.⁶ But the intent of one to make a certain state his domicile is sufficient to warrant the issuance of letters, where such intent is evidenced by the fact that the deceased at the time of his death was moving his property into the state, and such property afterwards arrives at its destination.⁷ And where the intestate has no fixed residence, letters may be granted in the state where he died,⁸ though where property is left in different states, administrators may be appointed in each;⁹ and a grant of administration in one state, or where the deceased is a resident of another state, does not impair the grant in such other state.¹⁰ Ordinarily, letters can be issued only in the county in which the deceased was domiciled or was resident at the time of his death, or where it appears that he had assets, or where

¹ *Willing v. Perot*, 5 Rawle, 264; *Isham v. Gibbons*, 1 Bradf. 69; *St. Jurjo v. Duncomb*, 2 Bradf. 105; *Plummer v. Brandon*, 5 Ired. Eq. 190.

² *Patillo v. Barksdale*, 22 Ga. 356.

³ *Andrews v. Avery*, 14 Gratt. 229; 73 Am. Dec. 355.

⁴ *Little v. Sinnett*, 7 Iowa, 324.

⁵ *Fletcher v. Sanders*, 7 Dana, 345; 32 Am. Dec. 96; *Watson v. Collins*, 37 Ala. 587.

⁶ *Estate of Harlan*, 24 Cal. 182; 85 Am. Dec. 58.

⁷ *Burnett v. Meadows*, 7 B. Mon. 277; 46 Am. Dec. 517.

⁸ *Leake v. Gilchrist*, 2 Dev. 73.

⁹ *Burbank v. Payne*, 17 La. Ann. 15; 87 Am. Dec. 513. See *post*, secs. 979-983.

¹⁰ *Henderson v. Clarke*, 4 Litt. 277; *Pond v. Makepeace*, 2 Met. 114; *Moore v. Tanner*, 5 T. B. Mon. 42; 17 Am. Dec. 35; *Cosby v. Gilchrist*, 7 Dana, 206.

his estate was, or the greater part of it.¹ The court of the county does not, however, acquire the exclusive right to issue letters because of a mere temporary residence in the county; the domicile must be a fixed one.² Different executors may be appointed in different counties where the testator has effects.³

§ 892. **Who may be Appointed.**—This depends to a great extent upon the statutes of the several states of the United States. By the statute 31 Edw. III., the next and most loyal friends of the deceased were entitled to letters;⁴ and by the common law the person entitled to the decedent's estate was of right entitled to the appointment.⁵ An heir has the preference over a husband or wife who survives;⁶ and in North Carolina, the next of kin has a preference over a creditor.⁷ In New Hampshire, a stranger cannot be appointed until the widow and next of kin have neglected to qualify, or have severally renounced their right.⁸ So in other states, if the next of kin or creditors, or persons entitled, do not apply within the time limited, any suitable and fit person may be appointed.⁹ A woman who appears to be the only heir may take out letters in Louisiana, in preference to a stranger.¹⁰ So a *feme covert* might be appointed by the civil law or by the courts spiritual; nor was her husband's assent necessary, such consent being presumed.¹¹ A widow has the preference, in New York and Alabama, over children and

¹ *Cooke v. Finley*, 29 Miss. 127; *Beckett v. Selover*, 7 Cal. 215; 68 Am. Dec. 237; *Johnson v. Corpenning*, 4 Ired. Eq. 216; 44 Am. Dec. 106; *Moore v. Philbrick*, 32 Me. 102; 52 Am. Dec. 642; *Fletcher v. Sanders*, 7 Dana, 345; 32 Am. Dec. 96.

² *George v. Watson*, 19 Tex. 354.

³ *Hunter v. Bryson*, 5 Gill & J. 483; 25 Am. Dec. 313.

⁴ *Potts v. Smith*, 3 Rawle, 361; 24 Am. Dec. 359. As to who may be appointed, see note to *Berry v. Hamilton*, 54 Am. Dec. 518.

⁵ *Leverett v. Dismukes*, 10 Ga. 98.

⁶ *Succession of Williamson*, 3 La. Ann. 261.

⁷ *Little v. Berry*, 94 N. C. 433; overruling *Button v. Turner*, 8 Jones, 403.

⁸ *Munsey v. Webster*, 24 N. H. 126.

⁹ *Atkinson v. Hasty*, 21 Neb. 663; *Garrison v. Cox*, 95 N. C. 353.

¹⁰ *Succession of Block*, 6 La. Ann. 810.

¹¹ *Palmer v. Oakley*, 2 Doug. 433; 47 Am. Dec. 41.

next of kin.¹ And in Texas, a widow by a second marriage will be given a preference over a son by a first marriage.² But a wife who leaves her husband, and refuses conjugal intercourse with him for a considerable time prior to his decease, is not entitled to letters.³ In the absence of a right of a surviving husband or wife to the preference, the next of kin have a paramount claim to have the appointment, but where the husband and wife are first entitled, the next of kin are next preferred.⁴ After the next of kin a creditor may be appointed, where his cause of action is one which survives.⁵ And one who has paid the funeral expenses of an intestate may, as a creditor, have the appointment, there being no relatives or other creditors.⁶ Where two persons having equal rights apply, the expressed wish of the testator may be considered in determining who shall be appointed.⁷ And in such case, other facts affecting the applicant's interest in the estate may be considered.⁸ One not a creditor who applies first may be granted administration in preference to an attorney in fact of creditors.⁹ An infant may be appointed executor.¹⁰ And in certain cases a corporation may act as administrator.¹¹ So an executor who is an attesting witness may be appointed.¹²

¹ *Lathrop v. Smith*, 24 N. Y. 417; *Curtis v. Williams*, 33 Ala. 570; *Schouler on Executors and Administrators*, secs. 99, 100.

² *Smith v. Smith*, 1 Tex. 621; 46 Am. Dec. 121.

³ *Odiorno's Appeal*, 54 Pa. St. 175; 93 Am. Dec. 683.

⁴ *Schouler on Executors and Administrators*, secs. 101-103, 111.

⁵ *Royce v. Merrill*, 12 Mass. 395; *Mitchell v. Lunt*, 4 Mass. 654; *Stebbins v. Palmer*, 1 Pick. 71; 11 Am. Dec. 146; *Williams on Executors*, 440-442; *Curtis v. Williams*, 33 Ala. 570.

⁶ *Lentz v. Pilert*, 60 Md. 696; 45 Am. Rep. 732.

⁷ *In re Powell*, 5 Demarest, 281.

⁸ *Moody v. Moody*, 29 Ga. 519.

⁹ *Succession of Petit*, 9 La. Ann. 207.

¹⁰ *Williams on Executors*, 232; but see *Schouler on Executors and Administrators*, sec. 32.

¹¹ *Deringer's Adm'r v. Deringer's Adm'r*, 5 Houst. 416; 1 Am. St. Rep. 150. "Whether a corporation can be executor has long been doubted. In some parts of the United States this point is decided adversely as to aggregate corporations in general, though companies may now be found whose charters expressly permit the exercise of such functions in connection with the care and investment of trust funds": *Schouler on Executors and Administrators*, sec. 32; *Williams on Executors*, 228, 229.

¹² *Murphy v. Murphy*, 24 Mo. 526. See also *Stewart v. Harriman*, 56 N. H. 25, 22 Am. Rep. 408, that executor is a competent witness to a will.

§ 893. **Who Disqualified.**—A person's moral fitness when appointed executor under the will cannot be inquired into by the court.¹ Illiteracy and poverty do not disqualify a decedent's widow from administering;² and where one is otherwise rightfully entitled, the fact that he is executor *de son tort* does not disqualify him;³ nor does non-residence necessarily disqualify one.⁴ But insolvency does;⁵ and letters will not be granted to a person who has interests antagonistic to the estate.⁶ Nor does the fact that one was a co-member of a lodge of Masons with the deceased entitle him to administration;⁷ nor will the law support a contract to purchase the office from one who has a lawful right to a grant of letters.⁸ But one who is a guardian of an infant heir is not thereby necessarily disqualified.⁹

§ 894. **Special Cases of Who are Administrators.**—A person appointed under a testamentary document executed by a *feme covert* is not necessarily an administrator, but merely an appointee in trust for the purposes of effectuating the testator's intentions, but, nevertheless, he takes to the same extent and for the same purposes as an executor.¹⁰ So although in equity, under a statute, the husband of an administratrix may be considered an administrator to carry out the intent of the statute, yet he is not strictly an administrator so as to render a claim against him for moneys received from the estate a preferred claim against his own estate, under the statute.¹¹ But a sheriff who is appointed administrator, and receives assets

¹ *Berry v. Hamilton*, 12 B. Mon. 191; 54 Am. Dec. 515.

² *Wilkey's Appeal*, 108 Pa. St. 567; *Bowersox's Appeal*, 100 Pa. St. 434; 45 Am. Rep. 337.

³ *Bingham v. Crenshaw*, 34 Ala. 683.

⁴ *Cutler v. Howard*, 9 Wis. 309; *In re Williams*, 44 Hun, 67.

⁵ *Cornprobst's Appeal*, 33 Pa. St. 537.

⁶ *Estate of Heron*, 6 Phila. 87.

⁷ *Holland v. Wheaton*, 6 La. 443; 26 Am. Dec. 481.

⁸ *Bowers v. Bowers*, 26 Pa. St. 74; 67 Am. Dec. 398.

⁹ *Townsend v. Tallant*, 33 Cal. 45; 91 Am. Dec. 617.

¹⁰ *Leigh v. Smith*, 3 Ired. Eq. 442; 42 Am. Dec. 182.

¹¹ *Davis v. Harkness*, 1 Gilman, 173; 41 Am. Dec. 184.

as such, will not be heard to say he is not an administrator, even though no letters were ever issued to him.¹

§ 895. Public Administrators.—A public administrator is, in California, entitled to administration upon all estates not otherwise administered.² He has, however, only such powers as are given him by law, though it is his duty to take immediate possession of the estate of any person dying without heirs.³ But he does not without a special grant acquire a right to administer upon any particular estate.⁴ And where the court appoints him, he continues his powers after the termination of his official term until another administrator is appointed.⁵ If a successor is appointed, the money and property in the public administrator's hands must be paid over to him.⁶ The clerk of the superior court may, in Georgia, be compelled to perform the duties of administrator.⁷ The prior right to a grant of letters exists in the public administrator over the appointee of a foreign executor who is not entitled by blood or marriage to a precedence.⁸ But the public administrator is not entitled to letters unless there is no relative in the state who is qualified, and unless the petition for appointment is made by a person who is interested in the estate.⁹

§ 896. Special Appointments.—Administrators *pendente lite*, or special administrators, may, in certain cases, be appointed with limited powers. Such administrator may be appointed on only a part of the estate.¹⁰ But an appointment *durante absentia testatoris* may not be made subsequent to the probate of the will and the issue of let-

¹ Thompson v. Bondurant, 15 Ala. 346; 60 Am. Dec. 136.

² Beckett v. Selover, 7 Cal. 215; 68 Am. Dec. 237.

³ Id.

⁴ Matter of Hamilton, 34 Cal. 464.

⁵ Beale v. Hall, 22 Ga. 431; Rogers v. Hoberlein, 11 Cal. 120.

⁶ State v. Watts, 23 Ark. 304.

⁷ Johnston v. Tatum, 20 Ga. 775.

⁸ Estate of Garber, 74 Cal. 338.

⁹ Langworthy v. Baker, 23 Ill. 484.

¹⁰ Williams on Executors, secs. 479, et seq.; Jordan v. Polk, 1 Sneed, 430; see Schouler on Executors and Administrators, secs. 134, 135.

ters testamentary.¹ And the functions of an administrator *pendente lite* determine, in Missouri, after the contest over the will is settled, and the executor qualifies.² A notice to distributees of the settlement of accounts of an administrator *pendente lite* is unnecessary under the Missouri statute; and such statute is not unconstitutional, as depriving a person of his property without due process of law under the constitution of the United States, because "the regular representative of the estate has an opportunity to contest the final settlement of the special administrator before giving him an acquittance. It cannot be said that the absence of notice to the distributees of such settlement amounts to a deprivation of their rights of property without due process of law."³

§ 897. **What Grants are Voidable and Void.**—The appointment by a probate judge of his own son is voidable only.⁴ So also is a grant of letters in the county where the deceased did not reside.⁵ And mere irregularity in the appointment, where the court has jurisdiction, can make it voidable and revocable only, not void.⁶ So a grant to one not entitled by priority to letters is merely voidable.⁷ And the failure to give bond as required by the order of appointment makes the grant voidable only.⁸ But it is also held that the execution of the administration bond by only one surety makes the grant void.⁹ A defect in the bond does not vitiate the appointment;¹⁰ nor does the fact that the bond is not justified invalidate the grant.¹¹

¹ Griffith v. Frazier, 8 Cranch, 9. As to appointments *durante absentia*, see Schouler on Executors and Administrators, sec. 133.

² Ro Bards v. Lamb, 89 Mo. 303.

³ Ro Bards v. Lamb, 89 Mo. 303; 127 U. S. 58, 62.

⁴ Koger v. Franklin, 79 Ala. 505.

⁵ Coltart v. Allen, 40 Ala. 155; 88 Am. Dec. 757. But see People's Sav. Bank v. Wilcox, 15 R. I. 258; 2 Am. St. Rep. 894.

⁶ Broughton v. Bradley, 34 Ala. 694;

73 Am. Dec. 474; Giddings v. Steele, 28 Tex. 733; 91 Am. Dec. 336.

⁷ Jones v. Bittinger, 110 Ind. 476; Garrison v. Cox, 95 N. C. 353.

⁸ Ex parte Maxwell, 37 Ala. 362; 79 Am. Dec. 62; Palmer v. Oakley, 2 Doug. 433; 47 Am. Dec. 41.

⁹ Bradley v. Commonwealth, 31 Pa. St. 522. *Contra*, see Bloom v. Burdick, 1 Hill, 130; 37 Am. Dec. 299.

¹⁰ Peebles v. Watts, 9 Dana, 102; 33 Am. Dec. 531.

¹¹ Garrison v. Cox, 95 N. C. 353.

The discovery of a will and the appointment of an executor repeals the grant.¹ A grant is not void, although it include two estates under the one appointment.² If the court has no jurisdiction, the grant is void.³ Nor is the appointment rendered valid by failing to take exception to his jurisdiction.⁴ And if the court is interested in the estate, he has no jurisdiction to appoint a special administrator therefor.⁵ After an appointment has been duly made of a competent person as administrator, any further appointment is absolutely void, unless there is an occurrence of one of those events or disabilities which either temporarily or permanently vacate the office, such as the incumbent's death, resignation, or removal.⁶ And this rule obtains, though the grant be voidable only.⁷ And the administrator so appointed has no such interest in the estate as will entitle him to apply for such revocation.⁸ So letters issued over those having a prior right, when they have not renounced, and who have not received notice, are invalid.⁹

The appointment of a general administrator, where the deceased was a non-resident, instead of an administrator *cum testamento annexo*, where the court has jurisdiction to make the latter grant, is such an irregularity as only makes the appointment voidable.¹⁰ The grant of letters by a judge who has a valid claim against the estate is void for want of jurisdiction.¹¹ An order of a county court granting letters *cum testamento annexo*, which does not state that the executors named refused to qualify, is

¹ Bigelow v. Bigelow, 4 Ohio, 138; 19 Am. Dec. 591.

² Grande v. Herrera, 15 Tex. 533.

³ Ex parte Barker, 2 Leigh, 719; Langworthy v. Baker, 23 Ill. 484.

⁴ Sigourney v. Sibley, 22 Pick. 507; 33 Am. Dec. 763.

⁵ Id.

⁶ Matthews v. Douthitt, 27 Ala. 273; 62 Am. Dec. 765; Springs v. Irwin, 6 Ired. 27.

⁷ Coltart v. Allen, 40 Ala. 155; 88 Am. Dec. 757.

⁸ Id.

⁹ Gans v. Dabergott, 40 N. J. Eq. 184. See Jurisdiction, sec. 903. As to grants and their validity, see note to Ex parte Maxwell, 79 Am. Dec. 65.

¹⁰ Broughton v. Bradley, 34 Ala. 694; 73 Am. Dec. 474.

¹¹ Sigourney v. Sibley, 22 Pick. 507; 33 Am. Dec. 762.

not void, if the executors did so refuse as a matter of fact.¹ An appointment upon the estate of a foreigner who died abroad, and who had no residence in the county at the time of his death, and no estate there, is only voidable.²

§ 898. Administration on Estate of Living Person. —

Although a grant of letters by a court of competent jurisdiction is *prima facie* evidence of the intestate's death, and that he died intestate,³ yet the presumption thus raised is of the lowest class, and is weak and inconclusive, and may be rebutted by slight evidence;⁴ and although the presumption of death from casualties and great perils, such as wars, pestilences, earthquakes, shipwrecks, and the like, is a basis upon which the court may exercise a sound legal discretion in granting letters of administration,⁵ nevertheless such letters cannot be granted on the estate of a living person supposed to be dead. The court acts without jurisdiction. The grant is absolutely null and void, and does not protect the administration, and the one who acts as administrator is a trespasser.⁶ But a purchaser from such administrator is liable for the payment of the purchase-money;⁷ and it is held in New York that a payment to him bars an action to compel a second payment.⁸

¹ *Peebles v. Watts's Adm'r*, 9 Dana, 102; 33 Am. Dec. 531.

² *Fisher v. Bassett*, 9 Leigh, 119; 33 Am. Dec. 227.

³ *Sims v. Boynton*, 32 Ala. 353; 70 Am. Dec. 540; *Munre v. Merchant*, 26 Barb. 383; *Brickhouse v. Brickhouse*, 11 Ired. 404; *Peterkin v. Inloes*, 4 Md. 175.

⁴ *Tisdale v. Connecticut M. L. Ins. Co.*, 26 Iowa, 170; 96 Am. Dec. 136.

⁵ *Succession of Vogel*, 16 La. Ann. 139; 79 Am. Dec. 571.

⁶ *Moore v. Smith*, 11 Rich. 569; 73 Am. Dec. 122, and note 126; *Devlin v. Commonwealth*, 101 Pa. St. 273; 47 Am. Rep. 710; *Duncan v. Stewart*, 25 Ala. 408; 60 Am. Dec. 527; *Jochum-*

sen v. Suffolk Sav. Bank, 3 Allen, 87; *D'Arusment v. Jones*, 4 Lea, 251; 40 Am. Rep. 12; *Melia v. Simmons*, 45 Wis. 334; 30 Am. Rep. 746; *Thomas v. People*, 107 Ill. 517; 47 Am. Rep. 458, and note 465.

⁷ *Duncan v. Stewart*, 25 Ala. 408; 60 Am. Dec. 527.

⁸ *Roderigas v. East River Sav. Inst.* 63 N. Y. 460; 20 Am. Rep. 555; although in this same case, 76 N. Y. 316, 32 Am. Rep. 309, the court held that the debtor was not protected, it appearing that the grant of administration was not made by the surrogate, or with his knowledge or consent, but that his clerk signed the appointment.

ILLUSTRATIONS. — Letters were granted either on direct evidence of death or on presumption arising from the fact of absence, unheard of for seven years, and no one claimed under the administration. *Held*, void: *Moore v. Smith*, 11 Rich. 569; 73 Am. Dec. 122.

§ 899. **Administration on Estate of One Civiliter Mortuus.**—We have failed to discover, after a most thorough examination, a single case of value as determining the present law in this country, where it is held that any person other than a monk professed was considered *civiliter mortuus* to the extent that administration might be taken out for that reason upon his estate, or the land vest *eo instanti* by reason of such fact in his heirs. One *civiliter mortuus* under the statutes ought not to be deemed naturally dead so far as retaining his title to property and protecting it is concerned, and it ought not certainly to devolve upon his successors or heirs simply because of the disability of imprisonment. This construction of the statutes would, it seems to us, be founded in greater justice, and more in consonance with the reason of the law, and more in keeping with the spirit of our institutions, than a conclusion to the *contra*.¹

§ 900. **Renunciation and Resignation.**—An executor who accepts a trust accepts it as an entirety, and cannot renounce a portion of it.² As to what constitutes a renunciation, it is held that an express declaration of renunciation is not necessary on the part of an executor, but that his refusal to act may be implied;³ though it is decided in Arkansas that such renunciation by an executor is not provable by acts *in pais*, but must be shown by the record;⁴ and the fact that an executor is appointed

¹ Note to *Avery v. Everett*, 6 Am. St. Rep. 379, 383. See also *Frazer v. Fulcher*, 17 Ohio, 260; *Graham v. Adams*, 2 Johns. Cas. 408; *Brown v. Mann*, 68 Cal. 517; *Cannon v. Windsor*, 1 Houst. 143; *O'Brien v. Hagan*, 1 Duer, 664.

² *Ross v. Barclay*, 18 Pa. St. 179; 55 Am. Dec. 616.

³ *Solomon v. Wixon*, 27 Conn. 520; *Ayres v. Weed*, 16 Conn. 291; *Thorn-ton v. Winston*, 4 Leigh, 152.

⁴ *Newton v. Cocke*, 10 Ark. 169.

administrator and acts as such does not amount to a renunciation of his right to the executorship.¹ An executor who renounces his office is deemed to have also renounced the trusts conferred on him under the will which are personal and discretionary;² and a party rightfully entitled to a grant of letters who renounces such right cannot subsequently abandon or retract the renunciation.³ One who renounces a right of administration by mistake may be subsequently restored thereto, upon the court being satisfied of the mistake.⁴ That the probate court has the right to accept the resignation of an administrator is clear,⁵ though an administrator or executor cannot resign his trust, where he has accepted it, unless authorized or permitted by statute;⁶ and an acceptance by the court of the resignation before the accounts have been settled with the estate is illegal and void.⁷ It is held in Alabama that a married woman may resign the office of administratrix under letters granted to her while sole, without her husband's concurrence, and that her resignation terminates with her husband's administration.⁸

§ 901. Revocation of Letters.—The court of probate may revoke letters testamentary or of administration, where they have been issued without jurisdiction, or irregularly or illegally issued, or for a special cause which

¹ *Taylor v. Tibbatts*, 13 B. Mon. 177.

² *Buckman v. Bonsor*, 23 N. Y. 298; 80 Am. Dec. 269.

³ *Stocksdale v. Conaway*, 14 Md. 99; 74 Am. Dec. 515; *Estate of Kirtlan*, 16 Cal. 161.

⁴ *Thomas v. Knighton*, 23 Md. 318; 87 Am. Dec. 571.

⁵ *Haynes v. Meeks*, 10 Cal. 110; 70 Am. Dec. 703.

⁶ *Washington v. Blunt*, 8 Ired. Eq. 253; *Williams on Executors*, 281; *Sitzman v. Paquette*, 13 Wis. 291; *Sears v. Dillingham*, 12 Mass. 358; see also *Schouler on Executors and Administra-*

tors, sec. 156; but examine *Comstock v. Crawford*, 3 Wall. 396.

⁷ *Haynes v. Meeks*, 10 Cal. 110; 70 Am. Dec. 703; *Morgan v. Dodge*, 44 N. H. 258; 82 Am. Dec. 213; *Thayer v. Homer*, 11 Met. 104; *Schouler on Executors and Administrators*, sec. 156; but see opinion of Burnett, J., in *Haynes v. Meeks*, 10 Cal. 110; 70 Am. Dec. 703.

⁸ *Rambo v. Wyatt's Administrator*, 32 Ala. 363; 70 Am. Dec. 544. As to renunciation upon condition unfulfilled, see *Rinehart v. Rinehart*, 27 N. J. Eq. 475.

no longer exists.¹ So letters may be revoked for other causes, as where they were issued upon a misrepresentation that there was no will, when in fact there was a will which had been probated;² or upon a fraudulent representation that deceased died intestate;³ or where the administrator fails to give the required legal security;⁴ but in case insufficient security is given, the administrator should be given an opportunity to give other security.⁵ So a second grant made while the first exists may be revoked.⁶ So letters *de bonis non* issued while the final settlement remained in full force are revocable;⁷ but non-residence does not disqualify in Georgia, or cause a revocation of the grant.⁸ Letters granted to a public administrator must be revoked, if at all, upon petition by a proper party in interest asking for administration. The court in such case will not revoke the appointment in favor of a stranger named in the petition;⁹ nor will an appointment be reversed upon petition of one who was entitled by priority of right, when such person has failed to make his application within the time limited by law.¹⁰ In the absence of anything to the contrary, the presumption attaches that the same court which revokes letters granted them;¹¹ and where the ground of the revocation was an illegality or informality only, the same person may, in New Jersey, be reappointed.¹²

ILLUSTRATIONS.—The procurement by one in Alabama of an appointment *cum testamento annexo* may be vacated upon petition by a foreign executor, and a showing that such grant was

¹ Morgan v. Dodge, 44 N. H. 255; 82 Am. Dec. 213; Gasque v. Moody, 12 Smedes & M. 153; Barber v. Converse, 1 Redf. 330; Hooper v. Stewart, 25 Ala. 408; Burns v. Van Loan, 29 La. Ann. 560; Williams on Executors, 576, 578; Edelen v. Edelen, 10 Md. 52; Harrison v. Clark, 87 N. Y. 572.

² Watson v. Glover, 77 Ala. 323.

³ Wallace v. Walker, 37 Ga. 265; 92 Am. Dec. 70.

⁴ Davenport v. Irvine, 4 J. J. Marsh.

60; Succession of De Flechier, 1 La. Ann. 20.

⁵ Wingate v. Wooten, 5 Smedes & M. 245.

⁶ White v. Brown, 7 T. B. Mon. 446.

⁷ Croxton v. Renner, 103 Ind. 223.

⁸ Brown v. Strickland, 28 Ga. 387; Walker v. Torrance, 12 Ga. 604.

⁹ Estate of Carr, 25 Cal. 586.

¹⁰ Sowell v. Sowell, 41 Ala. 359.

¹¹ State v. Johnson, 7 Blackf. 529.

¹² Delany v. Noble, 3 N. J. Eq. 539.

fraudulently procured: *Broughton v. Bradley*, 34 Ala. 694; 73 Am. Dec. 474.

§ 902. Removal of Executors or Administrators. —

Whether an executor or administrator may be removed from office rests largely in the discretion of the court and the special circumstances of each case. Waste, negligence, and mismanagement furnish sufficient grounds, as well as actual fraud or embezzlement.¹ So any defined statutory cause is sufficient,² or any inability or neglect which makes the incumbent "evidently unsuitable" for the office.³ Fraud or corruption will warrant removal,⁴ or the refusal in certain cases to obey the orders of the court.⁵ The failure to do what is necessary to protect the estate may be sufficient ground for removal;⁶ and it has been held in California that the marriage of an executrix divests her of authority to act.⁷ So an absence from the state for an extended period of time without authority from the court is a ground for removal in Texas.⁸ But there must be a sufficient notice and opportunity to be heard to warrant the removal even for cause.⁹

It is not, however, a sufficient cause to justify removal that the administrator is illiterate and unable to read or write, the application for removal being made by a creditor;¹⁰ nor does the mere fact of the appointment of another administrator operate as the removal of one holding the office by virtue of a due and regular appointment;¹¹

¹ *Lucich v. Medin*, 3 Nev. 93; 93 Am. Dec. 376; *Reynolds v. Zink*, 27 Gratt. 29.

² *Muirhead v. Muirhead*, 6 Smedes & M. 451.

³ Gen. Stats. Mass., c. 101, sec. 2; c. 100, sec. 8; *Thayer v. Homer*, 11 Met. 104.

⁴ *Giddings v. Steele*, 28 Tex. 733; 91 Am. Dec. 336.

⁵ *McFadgen v. Council*, 81 N. C. 195; *Morgan v. Dodge*, 44 N. H. 261; 82 Am. Dec. 213; *Wright v. McNatt*, 49 Tex. 425.

⁶ *Lucich v. Medin*, 3 Nev. 93; 93 Am. Dec. 376.

⁷ *Teschemacher v. Thompson*, 18 Cal. 11; 79 Am. Dec. 151.

⁸ *Hall v. Monroe*, 27 Tex. 700. But see *Walker v. Torrance*, 12 Ga. 604; *Wiley v. Brainerd*, 11 Vt. 107.

⁹ *Levering v. Levering*, 64 Md. 399.

¹⁰ *Gregg v. Wilson*, 24 Ind. 227.

¹¹ *Haynes v. Meeks*, 20 Cal. 288; *Grand v. Chairs*, 15 Tex. 550; *Petigru v. Ferguson*, 6 Rich. Eq. 378.

nor is it a sufficient cause for removal that the administrator prosecutes doubtful claims;¹ nor that he delays making returns where such delays are explained.²

It is declared in Mississippi that an executor can only be removed by the probate court granting the letters *cum testamento annexo* to another, and that the superior court has no power to remove for any cause;³ and the reasons for the removal should fully appear in the record.⁴ Where a suit is pending at the time of the removal, the deposed executor has no further standing in court in such suit.⁵

A reinstatement of a deposed administrator will be presumed where the records of the probate court show that after an order was made for removal, and another person was appointed in his stead, he still continues to administer upon the estate with the sanction of the court.⁶

§ 903. **Jurisdiction — Essentials of.** — We have seen that death and intestacy are necessary prerequisites to a valid grant of letters,⁷ and are of course essentials of jurisdiction to appoint, and such jurisdiction rests exclusively within the probate or other similar court with like powers.⁸ The power of the court, however, to grant letters of administration is said to depend upon the facts as they exist at the time the letters are issued, and if the court had not that power, none of the subsequent proceedings of such administration can have any validity in favor of any person, on the ground that he was ignorant of the want of such power in the court to make the grant.⁹

¹ Myrick's Prob. 97.

² Andrews v. Carr, 2 R. I. 117; and see Harris v. Seals, 29 Ga. 585.

³ Vick v. Mayor etc. of Vicksburg, 1 How. 379; 31 Am. Dec. 167.

⁴ Bronaugh v. Bronaugh, 7 J. J. Marsh. 621. But see Ragland v. King, 37 Ala. 80.

⁵ Townsend's Succ'n, 37 La. Ann. 408.

⁶ Dancy v. Stricklinge, 15 Tex. 557; 65 Am. Dec. 179.

⁷ Ante, sec. 890, When Letters may be Taken out.

⁸ McFarland v. Stone, 17 Vt. 165; 44 Am. Dec. 325.

⁹ Withers v. Patterson, 27 Tex. 491; 86 Am. Dec. 643.

§ 904. **Domicile or Estate as Requisites.**—The probate court of the county of which decedent was a resident at the time of his death alone has jurisdiction to appoint, in California, and the inclusion of the portion of the county of which he was a resident within the boundaries of a new county formed after his death will not transfer that jurisdiction to the probate court of the new county;¹ as to non-residents, the rule is, that jurisdiction obtains in a state other than that in which the deceased was domiciled at the time of his death, if there is personal estate to be administered in such latter state.²

§ 905. **Filling Vacancy.**—Where one of two executors named in a will declines the appointment, and the power is vested under the will in the probate court to fill any vacancy caused by the death or resignation of either, the court, in its official capacity, has the same authority to fill the appointment as if such executor had accepted the trust and then resigned.³ And the power to accept the resignation of an administrator and to make a second appointment are incidents of the original power to issue letters in the first instance.⁴

§ 906. **Special Grants.**—The court has no power to grant administration *pro tem*, or *pendente lite* after the succession has once been administered and closed.⁵ Nor has the court any power to appoint a custodian of the decedent's personal estate while an appeal by the executrix is pending from an order of said court requiring a bond.⁶ The court may, however, appoint an administrator *du-*

¹ Estate of Harlan, 24 Cal. 182; 85 Am. Dec. 58.

² Henderson v. Clarke, 4 Litt. 277; Miller v. Jones, 26 Ala. 247; Crosby v. Leavitt, 4 Allen, 410; Broughton v. Bradley, 34 Ala. 694; 73 Am. Dec. 474; Thumb v. Gresham, 2 Met. (Ky.) 306; Jeffersonville R. R. Co. v. Swayne, 26 Ind. 477; Grimes v. Talbert, 14 Md. 169. See also, as to county and non-

resident, Title where Granted, sec. 891.

³ Bishop v. Bishop, 56 Conn. 208.

⁴ Comstock v. Crawford, 3 Wall, 396.

⁵ Fisk v. Norvel, 9 Tex. 13; 58 Am. Dec. 123. See also, on this point, Special Appointments, sec. 896; Lamb v. Helm, 56 Mo. 420.

⁶ Sarle v. Court of Probate, 7 R. I. 270.

rante minore &late; that is, it has authority to make temporary appointment during the nonage of one named in the will as sole executor, or of one otherwise rightfully entitled.¹

§ 907. **Application for Grant.** — This, as well as other matters of probate jurisdiction, depends largely upon statutory provisions; but the same rules serve to stand as a basis, however, under the statutes as well as in other cases, and that is, that proper notice to the parties of the application for a grant of letters is necessary in order to give the court jurisdiction.² But where the appointment has been made and the will duly probated, the court has no jurisdiction at a subsequent term to inquire into the propriety of the court's action in issuing letters to the executor.³

§ 908. **Character of the Proceeding.** — The nature of the order or judgment under which the appointment is made is that of a proceeding *in rem*.⁴ So proceedings in the orphans' court relating to the sale of realty are *in rem*, and not *in personam*, and the real estate itself becomes subject to the action of the court for the purposes of a sale as soon as it has obtained information of facts sufficient to give it jurisdiction.⁵ And in general, a proceeding in probate is in its nature distinct from an action at law or a suit in equity, notwithstanding that the same court has jurisdiction in common law, chancery, and probate cases.⁶

§ 909. **Other Cases.** — Other important questions frequently arise as to the jurisdiction of the court in cases

¹ *Ellmaker's Estate*, 4 Watts, 34; *Pitcher v. Armat*, 6 Miss. 288; *Williams on Executors and Administrators*, 479 et seq.; *Taylor v. Barron*, 35 N. H. 484, 493; and see also *Wallis v. Wallis*, 1 Winst. (N. C.) 78.

² *Beckett v. Selover*, 7 Cal. 215; 68 Am. Dec. 237. See *Judgment*, sec. 974.

³ *Taylor v. Tibbatts*, 13 B. Mon. 177. See *Judgment*, sec. 974.

⁴ *Steen v. Steen*, 25 Miss. 513.

⁵ *Wyman v. Campbell*, 6 Port. 219; 31 Am. Dec. 677; *Satcher v. Satcher*, 41 Ala. 26; 91 Am. Dec. 498.

⁶ *Lucich v. Medin*, 3 Nev. 93; 93 Am. Dec. 376.

of ancillary administration; sales; accounts; distribution; correction of errors in orders and decrees; allowances and adjustment of administration expenses; the power to compel conveyances, to accept resignations of executors and administrators, to remove them from office; equity jurisdiction in probate matters; and other like or similar questions, — all of which will be considered herein under the various sections to which they perhaps more properly belong.¹

§ 910. Bond — A Prerequisite of Appointment. — The necessity of giving a bond before letters can formally and effectually issue is in conformity with the probate practice of the several states of the United States. It is a prerequisite to being duly qualified.² The general rule, however, is subject to qualifications, since the necessity of giving bonds may be dispensed with in most of the states by a provision in the will to that effect.³

Ordinarily, the bond required by the administrator must be with two sureties, who obligate themselves, as a rule, in double the value of the estate on which administration is granted.⁴

¹ As to the power of the court to dispense with administration in certain cases, see Schouler on Executors and Administrators, sec. 120; *Fretwell v. McLemore*, 52 Ala. 124; *Bean v. Bumpus*, 22 Me. 549; *Needham v. Gillett*, 39 Mich. 574; *Taylor v. Phillips*, 30 Vt. 238; *Clarke v. Clay*, 31 N. H. 393; *Pace v. Oppenheim*, 12 Ind. 533.

² *Holbrook v. Bentley*, 32 Conn. 502; *Gardner v. Gantt*, 19 Ala. 666; *Bankhead v. Hubbard*, 14 Ark. 298; *Fairfax v. Fairfax*, 7 Gratt. 36; *Echols v. Barrett*, 6 Ga. 443; *Pettingill v. Pettingill*, 60 Me. 411; *Clarke v. Chapin*, 7 Allen, 425; *Bradley v. Commonwealth*, 31 Pa. St. 522. See *Feray's Succession*, 31 La. Ann. 727.

³ Schouler on Executors and Administrators, sec. 137. But see *Bankhead v. Hubbard*, 14 Ark. 298; *Ex parte Brown*, 2 Bradf. 22. So a bond is not

required "when the testator has ordered or requested such exemption, or where all the persons interested in the estate certify their consent, or upon being cited in, offer no objection. Even thus the judge is still to regard the interests of the estate according to the preferable practice, and may at or after the granting of letters testamentary require a bond with sufficient surety or sureties, if he thinks this desirable because of some change in the situation or circumstances of the executor, or for sufficient cause"; citing *Mass. Gen. Stats.*, c. 129; *Smith v. Phillips*, 54 Ala. 8; *Clark v. Niles*, 42 Miss. 460; *Atwell v. Holim*, 7 Bush, 504; *Wells v. Child*, 12 Allen, 330; *Johns v. Johns*, 23 Ga. 31; *Freeman v. Kellogg*, 4 Redf. 218.

⁴ *Bradley v. Commonwealth*, 31 Pa. St. 532; *Clarke v. Chapin*, 7 Allen, 425; *Atkinson v. Christian*, 3 Gratt.

§ 911. **Bond — Conditions and Recitals.** — The bond given by an administrator upon his appointment is meant only to secure the faithful appropriation of the personal property of his intestate, and such bond can cover only breaches of that trust;¹ though in Alabama the bond is intended to cover all the duties of the administrator.²

The recital in a bond drawn in compliance with the statute that the testator died intestate is mere *descriptio personam*, and is wholly immaterial to the force and validity of the bond.³ But a provision that the estate shall be administered according to law is, in effect, a provision that it shall be administered according to the will of the deceased;⁴ and a provision for surrendering letters of administration in the event of a will being thereafter found and proved is properly inserted in the bond.⁵

§ 912. **Liability of Sureties — Liability of Executor must be Fixed.** — All claims must be liquidated, either by confession, or there must be a judgment fixing the liability of the administrator before any recovery can be had against the surety. This rule is well settled, although there are cases *contra*, and the rule applies whether the debt be due a creditor, legatee, or distributee.⁶

448; Tappan v. Tappan, 4 Fost. 400. But examine Jones v. Gordon, 2 Jones Eq. 352; Fera's Succession, 31 La. Ann. 727; Norman v. Grognaud, 17 N. J. Eq. 485. As to bond of public administrator, see Russell v. Irwin, 41 Ala. 292; Buckley v. McGuire, 58 Ala. 226; Thompson v. Bondurant, 15 Ala. 346; 50 Am. Dec. 136; State v. Purdy, 67 Mo. 89.

¹ Worgang v. Clipp, 21 Ind. 119; 83 Am. Dec. 343.

² Clarke v. West, 5 Ala. 117; and see secs. 912, 913.

³ Judge of Probate v. Claggett, 36 N. H. 381; 72 Am. Dec. 314.

⁴ Id.

⁵ Id.

⁶ Merrill v. Harris, 26 N. H. 142; 57 Am. Dec. 359; Com. v. Stub, 11 Pa. St. 150; 51 Am. Dec. 515; Lyles v. Mc-

Clure, 1 Bail. 7; 19 Am. Dec. 648; Cameron v. Justices, 1 Ga. 36; 44 Am. Dec. 636; Territory of Florida v. Redding, 1 Fla. 242; Dinkins v. Bailey, 23 Miss. 284; Commonwealth v. Moltz, 10 Pa. St. 527; 51 Am. Dec. 499; Jones v. Anderson, 4 McCord, 113; Taylor v. Stewart, 5 Call. 520; Hairston v. Hughes, 3 Munf. 568; Burke v. Adkins, 2 Port. 236; Eaton v. Benefield, 2 Blackf. 52; Thornton v. Glover, 25 Miss. 132; Ordinary v. Pettus, 11 Rich. 543; Bachelidor v. Elliott, 1 Hen. & M. 10; Ohio v. Cutting, 2 Ohio St. 1; Justices v. Sloan, 7 Ga. 31; Lobit v. Castille, 13 La. Ann. 563; Hamlin v. Kinley, 2 Or. 91; Faulk v. Judge, 2 Port. 538; Biggs v. Postlewait, 1 Ill. 198; County Court v. Price, 6 Ala. 36; Bague v. Blacklock, 2 Desaus. 602. The following cases hold *contra*: Smith v.

But such a judgment or decree by the orphans' or probate court fixing the executor's liability is sufficient to sustain a suit against the sureties,¹ because for most purposes a surety of an administrator is estopped by a judgment against him from denying the validity of the debt thereby established.²

§ 913. Sureties — When and for What Acts Liable. —

The same rule which applies to official bonds in general, that the sureties are liable only for the official acts and defaults of the principal, and for funds in his hands in his official capacity, applies to sureties on executors' and administrators' bonds.³ A surety's liability is limited, as a general rule, by the covenants of the bond, and cannot be extended beyond them by implication;⁴ and the liability does not extend, in general, beyond assets that come into the administrator's hands;⁵ nor does the liability include

Fagan, 2 Dev. 298; *Hobbs v. Middleton*, 1 J. J. Marsh. 176; *Judge of Probate v. Fillmore*, 1 D. Chip. 420; *Carow v. Mowatt*, 2 Edw. 57; *Strickland v. Murphy*, 7 Jones, 242; *Chairman v. Moore*, 2 Murph. 22; *Oldham v. Trimble*, 15 Mo. 225; note to *Commonwealth v. Stub*, 51 Am. Dec. 519.

¹ *Com. v. Stub*, 11 Pa. St. 150; 51 Am. Dec. 515, and cases *ante*; *People v. Stacy*, 11 Ill. App. 506; *Martin v. Tally*, 72 Ala. 23, 30; *McClellan v. Douney*, 63 Cal. 520; *Morrison v. Lavill*, 81 Va. 519; 1 Woerner on American Law of Administration, sec. 255.

² *Heard v. Lodge*, 20 Pick. 53; 32 Am. Dec. 197. But see *Lipscomb v. Postell*, 38 Miss. 476; 77 Am. Dec. 651; *Dawes v. Shed*, 15 Mass. 6; 8 Am. Dec. 80.

³ *Gregg v. Currier*, 36 N. H. 200; *Wattles v. Hyde*, 9 Conn. 10; note to *Com. v. Stub*, 51 Am. Dec. 519, where the liability is considered under the following heads: Extent of surety's liability on bonds; liability for proceeds or rents and profits of realty; liability for proceeds of sale of slaves; liability for assets received from an-

other state; liability for debt due from principal to the estate; liability for other funds; liability for acts or defaults as trustee, devisee, or otherwise than officially; liability for default committed or funds received before appointment or execution of bond; termination of liability; breach of bond, what constitutes; neglect to render accounts; converting, wasting, or misappropriation of assets; non-payment of debts, legacies, and distributive shares; neglect or refusal to deliver to successor or to pay into court; other breaches; remedy on bond, and statutes affecting remedy; liability of executor must be fixed before action on bond.

⁴ *White v. Ditson*, 140 Mass. 351; 54 Am. Rep. 473; *Scofield v. Churchill*, 72 N. Y. 565; *Warfield v. Brand*, 13 Bush, 77; *Small v. Commonwealth*; 8 Pa. St. 101; *Frazier v. Frazier*, 2 Leigh, 642; *Sanford v. Gilman*, 44 Conn. 461.

⁵ *Harker v. Irick*, 10 N. J. Eq. 269; *Ennis v. Smith*, 14 How. 400, 416; *McCampbell v. Gilbert*, 6 J. J. Marsh 592.

rents received or the proceeds of the sale of real estate after the death of the testator or intestate.¹

ILLUSTRATIONS.—A bond was made payable to A as the executor of B, and A died. *Held*, that the right to sue upon the bond was in the representative of A, and not of B: *Horskins v. Williamson*, T. U. P. Charlt. 145; 4 Am. Dec. 703.

§ 914. Sureties—When and for What Acts not Liable.

—An action does not lie by the next of kin, on an administration bond where the administrator has not administered the estate;² nor are the sureties barred where the administrator allows judgment to pass against him in an action barred by statute.³ And where the executor proceeds to execute the provisions of the will, and to pay legacies before any contest of the will, the surety is not liable for such estate as has been disposed of, where the acts of the executor are done in good faith, notwithstanding a sentence of nullity is subsequently pronounced against the will;⁴ nor can sureties be charged on the bond for a balance due from the first administration to a second one, where the second administrator is the same person as the first, and has been reappointed after resignation from the first office, and has settled both accounts on the same day, and the balance in question has been merely brought over from the first to the second account.⁵

ILLUSTRATIONS.—An executor meddles with property where he has no right. *Held*, that sureties were not liable: *McCampbell v. Gilbert*, 6 J. J. Marsh. 592. An antecedent debt is lost to the estate by administrator. *Held*, that sureties were not liable unless lost

¹ *Brooks v. Jackson*, 125 Mass. 307; *Brown v. Brown*, 2 Harr. (Del.) 5; *Reno v. Tyson*, 24 Ind. 56; see note *ante*, § 912; *Commonwealth v. Hilgert*, 55 Pa. St. 236; *Oldham v. Collins*, 4 J. J. Marsh. 49; but see *Worgang v. Clipp*, 21 Ind. 119; *Wilson v. Unselt*, 12 Bush, 215; *Burnett v. Harwell*, 3 Leigh, 89; *Stong v. Wilkson*, 14 Mo. 116; *Judge of Probate v. Heydock*, 8 N. H. 491; *Mass. Gen. Stats.*, c. 93, sec. 2; *Hannum v. Day*, 105 Mass. 38; *Clarke v. West*, 5 Ala. 171.

Unless made by administrator *de bonis non cum testamento annesso* in accordance with the directions of will: *Zeigler v. Sprenkle*, 7 Watts & S. 178. *Contra*, *Governor v. Chouteau*, 1 Mo. 731; *Probate Court v. Hazard*, 13 R. I. 3.

² *State v. Moore*, 11 Ired. 160; 53 Am. Dec. 401.

³ *Dawson v. Shed*, 15 Mass. 6; 8 Am. Dec. 80.

⁴ *Jones v. Jones*, 14 B. Mon. 373.

⁵ *Modawell v. Hudson*, 80 Ala. 265.

through the insolvency of the principal or through negligence to collect: *Rader v. Yeargin*, 85 Tenn. 486. So a judgment conclusively suffered by the principal does not bind the sureties: *Heard v. Lodge*, 20 Pick. 53; 32 Am. Dec. 197. And the presumption exists that assets of the decedent were held by one until his appointment as administrator, where he received them under an agreement to take out letters of administration, and therefore, in the absence of evidence to the contrary, the liability of the sureties on the bond attaches: *People v. Hascall*, 22 N. Y. 188; 78 Am. Dec. 176.

§ 915. **Sureties—Miscellaneous Cases.**—The sureties of an administrator are all liable to the distributees of an estate whatever their rights may be *inter se*.¹ And an administrator who purchases chattels at an administration sale has the legal title already, and is not bound to give further security therefor beyond his administration bond.² As to the remedy of a surety where he thinks the judgments of a probate court against his principal are unjust or not warranted by law, it would seem, under the Illinois statute, that he must appeal to the circuit court.³ A surety of an executor of a non-resident on a probate of his will granted in this state is not liable for assets received in another state.⁴

As to irregularities and mistakes in bonds, it appears that the courts will rather favor the sureties, if possible, than otherwise, especially where no injustice is thereby done the parties who might be rightfully entitled, as against such sureties; so it has been held that where, by mistake, the name of the deceased was inserted in the condition of the bond instead of that of the administrator, the bond will not thereby be vitiated, where the mistake is apparent from the face of the instrument itself without resorting to extrinsic facts.⁵ So where the

¹ *Glenn v. Wallace*, 4 Strob. Eq. 149; 53 Am. Dec. 657.

² *Cummings v. Coleman*, 7 Rich. Eq. 509; 62 Am. Dec. 402.

³ *Ralston v. Wood*, 15 Ill. 159; 58 Am. Dec. 604.

⁴ *Fletcher v. Sanders*, 7 Dana, 345; 32 Am. Dec. 96.

⁵ *Moore v. Chapman*, 2 Stew. 466; 20 Am. Dec. 56.

evidence fails to show affirmatively that a bond given before the sale of realty was approved strictly as the statute provides, yet if the other necessary steps appear to have been accurately taken, a valid sale may be presumed, especially where to do otherwise would, under the facts, work an injustice or deprive the purchaser of title held by him for more than twenty years.¹

§ 916. **Inventory.**—The duty to make and return an inventory of the estate is one of the conditions of the bond, and is, in addition, a statutory requisite in all the states, and unless the inventory is returned as required, it is a breach of the bond, for which the surety's liability may attach, and, in addition, it forms the basis on which to compel an account by the appointee under the grant.²

The purpose and intent of an inventory is also to form a basis of amount and value in cases of succession and community of property;³ and it is obligatory upon the executor or administrator to inventory all the property of which he has knowledge, whether in his own possession or that of others.⁴ So he must include his own debt.⁵ And it is proper to inventory property found with that of the deceased.⁶ But notes of an insolvent non-resident debtor of the estate may be omitted,⁷ though it may include property the title to which is in dispute.⁸

¹ *Austin v. Austin*, 50 Me. 74; 79 Am. Dec. 597. See also secs. 916, 945, 954.

² *Moore v. Holmes*, 32 Conn. 553; *Schouler on Executors and Administrators*, secs. 229 et seq.; *Sherwood v. Hill*, 25 Mo. 391; *Commonwealth v. Bryan*, 8 Serg. & R. 128; *State v. Smith*, 52 Conn. 557; *Bourne v. Stevenson*, 58 Me. 499; 2 *Woerner on American Law of Administration*, secs. 315 et seq. As to the time in which the inventory should be returned under the statutory provisions of the several states, see *Id.*, sec. 316. What is such a valid excuse for failure to make and return inventory as will avoid a breach of the bond, see *Adams v. Adams*, 22 Vt. 50; *McKim v. Har-*

wood, 129 Mass. 75; *Schouler on Executors and Administrators*, sec. 230.

³ *Succession of Pipkin*, 7 La. Ann. 617.

⁴ *Griswold v. Chandler*, 5 N. H. 492; *Turner v. Ellis*, 24 Miss. 173; see *Schouler on Executors and Administrators*, sec. 233, and 2 *Woerner on American Law of Administration*, sec. 317, for a full discussion of what estate is required to be inventoried.

⁵ *Linsensbigler v. Gourley*, 56 Pa. St. 166; 94 Am. Dec. 51; *Weems v. Bryan*, 21 Ala. 302.

⁶ *Waterhouse v. Bourke*, 14 La. Ann. 338.

⁷ *Black v. Whitall*, 9 N. J. Eq. 572; 59 Am. Dec. 423.

⁸ *Gold's Case*, Kirby, 100.

The return of an inventory affords a legitimate presumption that all property belonging to the estate is included.¹ But the omission of property from an inventory does not conclude minor heirs from claiming it as property of the intestate.²

Appraisers are ordinarily—or at least in the generality of states must be—appointed to value the estate inventoried.³

§ 917. **Assets.**—Assets are, strictly speaking, the money or property of the deceased lawfully in the hands of the executor or administrator,⁴ or all property of the deceased which is chargeable with the payment of his debts and legacies,⁵ though previous to 1795 there was no law in the territory northwest of the Ohio making real property assets in the hands of administrators for the payment of debts;⁶ but assets need not necessarily have been property in the hands of the testator or intestate.⁷ In addition to what are technically legal assets, there are what are known as equitable assets,⁸ although it is held in Pennsylvania that no such distinction exists.⁹

All single contract debts due the estate where the debtor resides are assets.¹⁰ So are debts due from an executor to his testator.¹¹ So a note executed to one as administrator

¹ *Morrill v. Foster*, 33 N. H. 379; *Reed v. Gilbert*, 32 Me. 519.

² *McWillie v. Van Vacter*, 35 Miss. 428; 72 Am. Dec. 127; *Walker v. Walker*, 25 Ga. 76.

³ 2 *Woerner on American Law of Administration*, sec. 316, p. 662; sec. 320, p. 669. As to inventory of additional estate, see *Id.*, sec. 316, p. 663. As to dispensing with inventory after lapse of time, see *Schouler on Executors and Administrators*, sec. 231.

⁴ *De Valengni v. Duffy*, 14 Pet. 282, 290; *Schouler on Executors and Administrators*, sec. 198; 2 *Woerner on American Law of Administration*, secs. 304 et seq.

⁵ *Story's Eq. Jur.*, sec. 531.

⁶ *Ludlow v. Johnson*, 3 Ohio, 553; 17 Am. Dec. 609.

⁷ *Williams on Executors*, 1656; 2 *Woerner on American Law of Administration*, sec. 306. But see *Schouler on Executors and Administrators*, sec. 204.

⁸ *Harper v. Archer*, 28 Miss. 212; *Speed v. Nelson*, 8 B. Mon. 499; *Law v. Law*, 3 Cranch C. C. 324.

⁹ *Sperry's Estate*, 1 Ashm. 347.

¹⁰ *Wyman v. Halstead*, 109 U. S. 654; *Rutledge v. Hazlehurst*, 1 McCord Ch. 466; *Kohler v. Knapp*, 1 Bradf. 241; *Bullock v. Rogers*, 16 Vt. 294.

¹¹ *Kaster v. Pierson*, 27 Iowa, 90; 1 Am. Rep. 254; *Stevens v. Gaylord*, 11 Mass. 256; *Winship v. Bass*, 12 Mass.

is *prima facie* assets.¹ Sonegotiable notes are effects of the deceased.² So are debts due from the United States.³ When a chattel mortgage is declared void by the statute, "as against the creditors of the mortgagor," and the mortgagor dies in possession of the mortgaged property, leaving an insolvent estate, such property becomes assets in the hands of the executor or administrator of the mortgagor.⁴ Any savings or accumulations of the estate by the administrator are assets.⁵ So are emblements upon land not devised.⁶ So are rents received and accounted for by the administrator.⁷ So are damages assessed by the court for illegal layout of highway over land of testator in his lifetime.⁸ So is property consisting of notes, etc., of non-resident parties, although payable to a trustee.⁹ So is the benefit of an investment made by administrator for the estate.¹⁰ So the bond of an obligor who becomes the administrator of the obligee becomes thereby suspended, and the debt becomes assets.¹¹ The proceeds of the sale of land under a will are such assets.¹² So is property purchased for the estate out of funds of the estate.¹³ An advancement made during the life of the testator is no part of the estate to be administered on by the executor.¹⁴ Bonds by the testator's sons, and indorsed to the obligors by the testator, are not assets.¹⁵ Manure taken from the barn-

199; *Hays v. Jackson*, 6 Mass. 150; *Hall v. Hall*, 2 McCord Ch. 269; *Marvin v. Stone*, 2 Cow. 781; *Farys v. Farys*, 1 Harp. Eq. 261; *Leland v. Felton*, 1 Allen, 531.

¹ *Jones v. Everman*, 15 B. Mon. 631; 63 Am. Dec. 521.

² *Slocum v. Sanford*, 2 Conn. 533; but see *Owen v. Miller*, 10 Ohio St. 136; 75 Am. Dec. 502; *Wyman v. Halstead*, 109 U. S. 654.

³ *Wyman v. Halstead*, 109 U. S. 654.

⁴ *Kilbourne v. Fay*, 29 Ohio St. 264; 23 Am. Rep. 741.

⁵ *Wingate v. Poole*, 25 Ill. 118.

⁶ *Bradshaw v. Ellis*, 2 Dev. & B. Eq. 20; 32 Am. Dec. 686.

⁷ *Crowder v. Shackelford*, 35 Miss. 321.

⁸ *Astor v. Hoyt*, 5 Wend. 603; *Welles v. Cowles*, 4 Conn. 182; 10 Am. Dec. 115; *Goodwin v. Milton*, 25 N. H. 458.

⁹ *Woodfin v. McNealy*, 9 Fla. 256.

¹⁰ *Mosely v. Lane*, 27 Ala. 62; 62 Am. Dec. 752.

¹¹ *Bigelow v. Bigelow*, 4 Ohio, 139; 19 Am. Dec. 591.

¹² *Law v. Law*, 3 Cranch C. C. 324; *Speed v. Nelson*, 8 B. Mon. 499; *Dixon v. Ramsay*, 1 Cranch C. C. 496.

¹³ *Harper v. Archer*, 28 Miss. 212.

¹⁴ *Chase v. Lockerman*, 11 Gill & J. 185; 35 Am. Dec. 277; *Black v. Whittall*, 9 N. J. Eq. 572; 59 Am. Dec. 423.

¹⁵ *Thomas v. Smith*, 3 Whart. 401.

yard of the intestate, and piled upon his land, is part of the realty, and not assets.¹ Goods of third party, intermixed with the testator's property, are not assets.² Nor is money derived from the sale of such goods.³ Nor are buildings erected on lands of his wife by the intestate.⁴ Nor is the subscription list and good-will of a printing-office.⁵ Nor those things held by one in trust for another, and in which he has no beneficial interest.⁶ Nor is a surplus from a sale of lands in another state, but which never came into the hands of the administrator of the state of domicile.⁷

§ 918. To What Administration Assets Belong.—Assets go to the administration in another state, if they are to be administered according to the laws of that state, and all the claimants reside there.⁸ A transfer of assets from an ancillary administration to the state of the domicile will ordinarily be ordered, although this is not an unwavering rule, but one subject to the discretion of the court.⁹

§ 919. Marshaling Assets in Payment of Debts, Etc.—Primarily, the personal property is to be resorted to in the payment of debts. Of course this only includes such personal property as is not specifically bequeathed or exempted; next follows real estate which may be specifically appropriated for such purpose; next in order is the descended estate, whether the will was made prior to acquiring the same or not; and finally, the lands specifically devised.¹⁰ This rule, that the personal estate is the pri-

¹ *Fay v. Muzzey*, 13 Gray, 53; 74 Am. Dec. 619.

² *Cooper v. White*, 19 Ga. 554.

³ *Cooper v. White*, 19 Ga. 554.

⁴ *Washburn v. Sproat*, 16 Mass. 449.

⁵ *Seighman v. Marshall*, 17 Md. 550.

⁶ *Johnson v. Ames*, 11 Pick. 173; *Green v. Collins*, 6 Ired. 139; *Thompson v. White*, 45 Me. 445.

⁷ *Young v. Kennedy*, 95 N. C. 265.

⁸ *Sanford v. Thompson*, 18 Ga. 554.

⁹ *Williams v. Williams*, 5 Md. 467; *Gilchrist v. Cannon*, 1 Cold. 581; *Lawrence v. Kitteridge*, 21 Conn. 577; 56 Am. Dec. 385; *Cassilly v. Meyer*, 4 Md. 1; *Porter v. Heydock*, 6 Vt. 374; *Mourain v. Poydras*, 6 La. Ann. 151.

¹⁰ *Elliott v. Posten*, 4 Jones Eq. 433; *Stevens v. Gregg*, 10 Gill & J. 143; *Hoye v. Brewer*, 3 Gill & J. 153; *White-*

mary fund, applies even where the charge is expressly made upon real estate under descent or devise.¹

In marshaling assets, however, the rule of substitution does not apply to the extent of subjecting one fund to the relief of another, in the absence of any showing whereby it clearly appears that the fund intended to be substituted was liable to the debt discharged by the other fund.² As to bonds not due at the testator's decease, they are to be ranked with those then due, where the estate is insolvent;³ and dormant judgments are to be ranked with bonds and like obligations.⁴

ILLUSTRATIONS. — Funds in the hands of an administrator, which are not needed to pay the expenses of the funeral and last sickness of the intestate and the allowance to his family, should be applied to the payment of debts: *Walls v. Walker*, 37 Cal. 424; 99 Am. Dec. 290. A conveyance of land was made in trust by the grantor by a duly executed deed, in order to secure a debt, and the grantor deceased, the deed then being unrecorded, and he being largely indebted, and such debts were charged upon the real estate by will. *Held*, that only the equity of redemption could be held for the debts: *McCandlish v. Keen*, 13 Gratt. 615. A bond creditor cannot, in equity, subject the real estate to the satisfaction of his claim, until the personal assets in the executor's or administrator's hands are exhausted: *Foster v. Crenshaw*, 3 Munf. 514; *Corbet v. Johnson*, 1 Brock. 77.

§ 920. Title of Executor and Administrator. — Although the title to the personal property vests in the executor or administrator upon his appointment, yet it is only for a special purpose, limited by very force of the grant to the legal administration of the estate, and his title and power of disposition of such property for this

head *v. Gibbins*, 10 N. J. Eq. 230; *Hays v. Jackson*, 6 Mass. 149; *Wynns v. Burden*, 5 Jones Eq. 377; *Alexander v. Worthington*, 5 Md. 471; *Dunbar v. Dunbar*, 3 Vt. 472; *Thomas v. Thomas*, 17 N. J. Eq. 356; 2 Woerner on Am. Law of Administration, secs. 489 et seq., where the order of marshaling assets is differently subdivided and the divisions greater in number.

¹ *Stevens v. Gregg*, 10 Gill & J. 143; *Wyse v. Smith*, 4 Gill & J. 296. A mortgage must be enforced before looking to the personalty: *Moore v. Dunn*, 92 N. C. 63.

² *Greenlee v. McDowell*, 3 Jones Eq. 325.

³ *Hutchison v. Bates*, 1 Bail. 111.

⁴ *Williams v. Price*, 21 Ga. 507.

purpose is as absolute as was that of the testator himself, and such title vests on the appointment by relation to the time of the testator's or intestate's death.¹ The title to personal property may, however, under certain circumstances, — as where it is not necessary that an administrator be appointed and none is appointed, — vest, under the statute, immediately in the heirs at law.²

Although it is generally true that the administrator has possession of all property of the estate, real as well as personal, and may sue in relation to the same, and may, under proper order of court, sell the real estate, and may otherwise hold the same until distribution or settlement of the administration,³ yet he has nothing to do therewith other than as above stated, and takes no title thereto or interest therein unless for the payment of debts.⁴ The proceeds of a sale of land remaining unpaid to the intestate is such personal property as that the administrator takes

¹ Griffith v. Frazier, 8 Cranch, 9; Petrie v. Clark, 11 Serg. & R. 377; 14 Am. Dec. 636; Womson v. Sayward, 13 Pick. 402; 23 Am. Dec. 691; Jewett v. Smith, 12 Mass. 309; Clapp v. Stoughton, 10 Pick. 463; Lawrence v. Wright, 23 Pick. 128; Palmer v. Palmer, 55 Mich. 293; Schouler on Executors and Administrators, sec. 238; Brackett v. Hoitt, 20 N. H. 257; Dawes v. Boylston, 9 Mass. 337; 6 Am. Dec. 72; Petersen v. Chemical Bank, 32 N. Y. 21; 88 Am. Dec. 298; Andrews v. Brumfield, 32 Miss. 107; and see also titles, *post*, De Bonis non, and Purchaser. "The title of an executor in the personal property of his testator, being derived from the will, doubtless vests in him from the moment of the testator's death": Wall v. Bissell, 125 U. S. 382, 387; Babcock v. Booth, 2 Hill, 181; 38 Am. Dec. 578; Kelly v. Kelly, 9 Ala. 908; 44 Am. Dec. 469; Priest v. Watkins, 2 Hill, 225; 38 Am. Dec. 584; Vroom v. Van Horne, 10 Paige, 549; 42 Am. Dec. 94; and cases *ante*. The administrator and heirs of the decedent take the same right and interest in his estate as he had: Kennerly v. Shepley, 15 Mo. 640; 57 Am. Dec. 219. An administrator with the

will annexed has the same rights of property as the executor named in the will would have if he had qualified: Petersen v. Chemical Bank, 32 N. Y. 21; 88 Am. Dec. 298.

² Andrews v. Brumfield, 32 Miss. 107.

³ Carnall v. Wilson, 21 Ark. 62; 76 Am. Dec. 351; Harwood v. Marye, 8 Cal. 580; Meeks v. Hahn, 20 Cal. 620; Curtis v. Sutter, 15 Cal. 259; Curtis v. Herrick, 14 Cal. 117; 73 Am. Dec. 632; Edwards v. Evans, 16 Wis. 181; Menifee v. Menifee, 8 Ark. 9; Easterling v. Blythe, 7 Tex. 210; 56 Am. Dec. 45; Bergin v. McFarland, 26 N. H. 533.

⁴ Thayer v. Lane, 1 Walk. 200; Drinkwater v. Drinkwater, 4 Mass. 354; Lane v. Thompson, 43 N. H. 320; Hathaway v. Valentine, 14 Mass. 500; Vance v. Fisher, 10 Humph. 211; Gladson v. Whitney, 9 Iowa, 267; Walbridge v. Day, 31 Ill. 379; 83 Am. Dec. 227; Lockwood v. Lockwood, 2 Root, 409; Stearns v. Stearns, 1 Pick. 157; Smith v. McConnell, 17 Ill. 135; 63 Am. Dec. 340; Crocker v. Smith, 32 Me. 244; Gibson v. Farley, 16 Mass. 280; Phelps v. Funkhouser, 39 Ill. 405.

title thereto;¹ and the same is true of the surplus remaining over after sale of the testator's land on execution.² So an executor who is made a trustee of land is said to thereby become vested with the legal title.³ And a devise to an executor in person, with direction to sell, vests the fee in the heir, to become divested whenever the power is exercised.⁴ But he may, under a conveyance of land, maintain a suit regarding the same.⁵

An administrator's acts prior to his appointment cannot affect his title as such,⁶ and on his being dismissed, he must deliver to his successor all the property held by him as administrator.⁷

The following cases show what have been considered such personal property as to vest title in the executor or administrator as such: Choses in action are such property;⁸ so is perishable property necessary to support stock during the interval between the testator's death and the probate of the will;⁹ so is purchase-money agreed to be paid for the sale of land by deceased;¹⁰ so is a right to damages assessed by the county court in favor of the owner of land through which a public road has been laid out;¹¹ so are agricultural products, such as corn, and the like;¹² so are rents and profits which have accrued prior

¹ *Anthony v. Peay*, 18 Ark. 24; *Henson v. Ott*, 7 Ind. 512; *Matter of Everitt*, 2 Edw. 597; *Loring v. Cunningham*, 9 Cush. 87; *Sutter v. Ling*, 25 Pa. St. 466.

² *Vincent v. Platt*, 5 Harr. (Del.) 164; *Garlick v. Patterson*, Cheves Eq. 27.

³ *Ross v. Barclay*, 18 Pa. St. 179; 55 Am. Dec. 616.

⁴ *Ware v. Murph*, Rice, 54; 33 Am. Dec. 97; *Clendenning v. Lanius*, 3 Ind. 441; 56 Am. Dec. 518; *Going v. Emery*, 16 Pick. 107; 26 Am. Dec. 645.

⁵ *In re Smith*, 4 Nev. 254; 97 Am. Dec. 531. The title to land conveyed to an administrator vests in him *sub modo* only, and for the purposes of the administration: *Easterling v. Blythe*, 7 Tex. 210; 56 Am. Dec. 45. A conveyance to two or more executors

vests title in them as such in joint tenancy: *Bank of Utica v. Mersereau*, 3 Barb. Ch. 526; 49 Am. Dec. 189.

⁶ *Wiswell v. Wiswell*, 35 Minn. 371. But as to his prior acts of possession of property other than the testators, see *Bryan v. Weems*, 23 Ala. 423; 65 Am. Dec. 407.

⁷ *Ward v. Beville*, 10 Ala. 197; 44 Am. Dec. 478.

⁸ *Heidenheimer v. Wilson*, 31 Barb. 636.

⁹ *Smith v. Barham*, 2 Dev. Eq. 420; 25 Am. Dec. 721.

¹⁰ *Hays v. Hall*, 4 Port. 374; 30 Am. Dec. 530.

¹¹ *Welles v. Cowles*, 4 Conn. 182; 10 Am. Dec. 115.

¹² *Thornton v. Burch*, 20 Ga. 791; *Wadsworth v. Allcott*, 6 N. Y. 64;

to the lessor's death; otherwise of those accruing thereafter.¹

ILLUSTRATIONS.—Land was devised to the executor named in the will in trust for certain purposes; the executor renounced, and an administrator with the will annexed was appointed. *Held*, that the administrator did not become trustee, nor succeed to any right in the trust estate: *Dinning v. Ocean National Bank*, 61 N. Y. 497; 19 Am. Rep. 293.

§ 921. Powers of Executors and Administrators under the Will.—At the common law, an executor or administrator could not sell the real estate of the deceased for the payment of his debts, unless it was expressly charged for that purpose. Such real estate descended to the heirs,² and the doctrine now obtains that the personal representative has no power to sell the realty or to convey lands in the absence of a direction to that effect arising expressly or by implication under the will;³ although it is held in Georgia that the power to sell is incident to the office of an executor without directions to that effect in the will.⁴ Whatever general power exists in an executor to sell is extended or confirmed by a power conferred by will.⁵

Waring v. Purcell, 1 Hill Ch. 193; *Penhallow v. Dwight*, 7 Mass. 34; 5 Am. Dec. 21; *Gwin v. Hicks*, 1 Bay, 503; *McLaurin v. McCall*, 3 Strob. 21.

¹ *Stinson v. Stinson*, 38 Me. 593; see also *King v. Anderson*, 20 Ind. 385; *Fleming v. Chunn*, 4 Jones Eq. 422; *Foteaux v. Lepage*, 6 Iowa, 123; *Gibson v. Farlay*, 16 Mass. 280; *Foltz v. Prouse*, 17 Ill. 487; *Mills v. Merryman*, 49 Me. 65; *Smith v. Bland*, 7 B. Mon. 21; *Haslage v. Krugh*, 25 Pa. St. 97; *Sparhawk v. Allen*, 25 N. H. 261; *Fray v. Holloran*, 35 Barb. 295; but see *McCoy v. Scott*, 2 Rawle, 222; 19 Am. Dec. 640.

² *Ticknor v. Harris*, 14 N. H. 272; 40 Am. Dec. 186; *White v. Beard*, 5 Port. 94; 30 Am. Dec. 552.

³ *Beard v. Rowan*, 1 McLean, 135; *Clark v. Hornthal*, 47 Miss. 434, 474; *Booraem v. Wells*, 19 N. J. Eq. 87, 96; *Drumfield v. Brook*, 101 Ind. 190, 196; *Hoyt v. Day*, 32 Ohio St. 101, 109. Examine 2 Woerner on American Law of Administration, sec. 339. This

rule does not, of course, have reference to sales made by order of court, for which see Sales by Executors and Administrators, sec. 935.

⁴ *Bond v. Zeigler*, 1 Ga. 324; 44 Am. Dec. 656.

⁵ *Durham's Estate*, 49 Cal. 49; *Dugan v. Hollins*, 11 Md. 41. As to power of executor to sell before admission of the will to probate, see note to *Arnold v. Arnold*, 55 Am. Dec. 436; *Doolittle v. Lewis*, 7 Johns. Ch. 45; 11 Am. Dec. 389; and in general, as to the powers of executors, see note to *Vaughn v. Barret*, 26 Am. Dec. 309, and note to *Ela v. Edwards*, 90 Am. Dec. 175. As to powers of executors in relation to equitable conversion under the will, see note to *Ford v. Ford*, 5 Am. St. Rep. 141, and Wills. They are bound to observe the provisions of the will in regard to special appropriations: *Vorhees v. Stoothoff*, 11 N. J. L. 145; *Covenhoven v. Covenhoven*, 1 N. J. L. 210.

§ 922. **Express and Implied Powers.**—A power to sell may be created by express words in a will,¹ or it may arise by implication, as if the testator directs lands to be sold for a special purpose without stating by whom the sale is to be made. A power to sell is conferred by implication upon the executor.² So executors have the power to sell land of the testator without a decree of a court of equity, where the testator directs the land to be sold and the proceeds to be distributed to certain persons, without declaring by whom the sale shall be made; for such disposition is to be regarded as a bequest of a fund distributable to the legatees by the executors; who therefore take, by implication, the power to sell the land and convert it into money without a decree of court.³

A power of sale is given by implication to an executor, where the testator, having a right to dispose of realty, directs something to be done by the executor, which necessarily implies that the realty is to be first sold.⁴ So where one claims and holds lands through an executor, and such lands are coextensive with the grant to the deceased, the authority of the execution to convey will be presumed.⁵ Under a power "to pay, if they see proper, just debts barred by the statute of limitations," it was held that no power was thereby given to pay debts of their own which were barred.⁶ A bequest of an annuity payable out of lands gives the executor a power to dispose of the lands by sale or otherwise.⁷

¹ *Abbey v. Hill*, 64 Miss. 340.

² *Jenkins v. Stouffer*, 3 Yeates, 163; *Anderson v. Turner*, 3 A. K. Marsh. 131; *Houck v. Houck*, 5 Pa. St. 273; *Rankin v. Rankin*, 36 Ill. 293; 87 Am. Dec. 205; *Ward v. Ward*, 105 N. Y. 68; *McCullum v. McCollum*, 33 Ala. 711. A power under a will to sell does not authorize an executor to sell whatever property he pleases: *McCants v. Bee*, 1 McCord Ch. 383; 16 Am. Dec. 610. As to execution of a contingent power to sell, see *Stevens*

v. Winship, 1 Pick. 318; 11 Am. Dec. 178.

³ *Rankin v. Rankin*, 36 Ill. 293; 87 Am. Dec. 205. See also as to equitable conversion, note to *Ford v. Ford*, 5 Am. St. Rep. 141, and *Wills*.

⁴ *Going v. Emery*, 16 Pick. 107; 26 Am. Dec. 645.

⁵ *McCullough v. Wall*, 4 Rich. 68; 53 Am. Dec. 715.

⁶ *Williams v. Williams*, 15 Lea, 438.

⁷ *Ex parte Elliott*, 5 Whart. 524; 34 Am. Dec. 572.

ILLUSTRATIONS.—A will charged the testator's estate, real and personal, with his debts, and authorized the sale of the property and the payment of the debts by the executor. *Held*, that an express trust was thereby created: *Abbey v. Hill*, 64 Miss. 340.

§ 923. **Delegation of Power to Sell.**—An executor cannot delegate to an agent a discretionary power to sell lands.¹ But a contract for the sale of land of the estate, though made by another person than the executor, is made valid when ratified by the executor, who has power to sell, since in ratifying he exercises the discretionary powers of his personal trust.²

ILLUSTRATIONS.—The direction of the executor was to sell "in such mode as in his judgment shall be for the best interest of the estate." *Held*, that the power to sell could not be delegated: *Pearson v. Jamison*, 1 McLean, 197.

§ 924. **Power of Administrator cum Testamento Annexo to Sell.**—A trust in the executor to sell, given by will, is a personal confidence, and cannot be executed by an administrator *cum testamento annexo*, although the object of the sale is to pay debts,³ and this rule applies where the power given is to sell property in another state.⁴ But it is held that the trust may be executed by the court where the property given and the objects to be benefited are certain.⁵

§ 925. **Naked Powers, and Powers Coupled with an Interest.**—A distinction seems to exist between a mere naked power to sell and a power coupled with an interest. "While it may savor somewhat of technical refinement

¹ *Newton v. Bronson*, 13 N. Y. 587; 67 Am. Dec. 89. But see *May v. Frazer*, 4 Litt. 391; 14 Am. Dec. 159.

² *Newton v. Bronson*, 13 N. Y. 587; 67 Am. Dec. 89.

³ *Moody v. Van Dyke*, 4 Binn. 31; 5 Am. Dec. 385; *Tippett v. Mize*, 30 Tex. 361; 94 Am. Dec. 313; *Lockwood v. Stradley*, 1 Del. Ch. 298; 12 Am. Dec.

97, and note 102; *Ingle v. Jones*, 9 Wall. 486; *Lucas v. Doe*, 4 Ala. 679; see *Shaw v. Berry*, 35 Me. 279; 58 Am. Dec. 702.

⁴ *Montgomery v. Millikin*, 5 Smedes v. M. 151; 43 Am. Dec. 507.

⁵ *Lockwood v. Stradley*, 1 Del. Ch. 298; 12 Am. Dec. 97.

and astute discrimination, it is clearly settled by the general current of English and American authority that if a testator by his will simply directs his executor or a trustee to sell real estate and apply the proceeds to certain specific purposes, such executor or trustee will take a power only, whereas, if the devise be to the executor or trustee to sell and apply the proceeds, etc., such executor or trustee will take an estate in the land, and not a mere power."¹

A power to the executor to sell when in his opinion a sale can be made to good advantage, and to distribute the proceeds among the testator's children as they come of age, is a power coupled with an interest, and entitles the executor to the possession of the land.²

ILLUSTRATIONS. — The will gave executors "full and complete power as I myself possess to dispose of all my estate, real, personal, and mixed, in that way and manner which they may think best calculated to carry into effect all the purposes specified." *Held*, to give a power coupled with an interest, so as to vest in them the fee: *Williams v. Veach*, 17 Ohio, 171; 49 Am. Dec. 453.

§ 926. When Power to Sell Survives. — The distinction indicated in the last section becomes of force in its application to powers to sell given to several in determining whether such power to sell survives. The rule seems to be, however, that a mere naked power, or a power given to executors not pertinent to their office, does not survive on the death or renunciation of one of them; but if the power given by a will to executors to sell be coupled with an interest or with a trust the execution of which depends upon the sale, it survives.³

¹ The court in *West v. Fitz*, 109 Ill. 425, 435; citing 2 Washburn on Real Property, 661; and see *Seymour v. Bull*, 3 Day, 388.

² *Dabney v. Manning*, 3 Ohio, 321; 17 Am. Dec. 597.

³ *Mallet v. Smith*, 6 Rich. Eq. 12; 60 Am. Dec. 107; *Peter v. Beverly*, 10

Pet. 532, 564, 566; *Lessee of Zebach v. Smith*, 3 Binn. 69; *Osgood v. Franklin*, 2 Johns. Ch. 1; 7 Am. Dec. 513; *Anderson v. Turner*, 3 A. K. Marsh. 131; *Bradford v. Monka*, 132 Mass. 405; *Houck v. Houck*, 5 Pa. St. 273; *Jenkins v. Stouffer*, 3 Yeates, 163; *Bell's Adm'r v. Humphrey*, 8

§ 927. **Character and Effect of Power to Sell.**—A mere power to sell realty does not make the executor liable for the rents.¹ Nor does a power to convey land make him a warrantor of the title.² So the power to sell within a given time does not necessitate the execution of a deed within that period, if the sale itself has been within it.³ And the power to sell all the estate does not authorize a sale of after-acquired property.⁴ And it is held that a sale cannot be made until after expiration of the husband's curtesy.⁵

The power is attached to the office, and not to the persons named as executors.⁶ And such power makes the executors in whom it is vested trustees for the devisees and heirs, and also for the creditors.⁷ The power to sell operates the same as a devise to sell.⁸

W. Va. 1, 21. "But the difficulty arises in the application of the rule to particular cases. It may, perhaps, be considered as the better conclusion to be drawn from the English cases on this question, that a mere direction in a will to the executors to sell land, without any words vesting in them an interest in the land, or creating a trust, will be only a naked power which does not survive. In such case there is no one who has a right to enforce an execution of the power, but when a thing is directed to be done in which third persons are interested, and who have a right to call on the executors to execute the power, such power survives. This becomes necessary for the purpose of effecting the object of the power. It is not a power coupled with an interest in executors because they may derive a personal benefit from the devise. For a trust will survive though no way beneficial to the trustee. It is the possession of the legal estate, or a right in the subject over which the power is to be exercised, that makes the interest in question. And when an executor, guardian, or other trustee is invested with the rents and profits of land for the sale or use of another, it is still an authority coupled with an interest, and survives. In the American cases there seems to be less confusion and nicety

on this point, and the courts have generally applied to the construction of such powers the great and leading principle which applies to the construction of other parts of the will, to ascertain and carry into execution the intention of the testator. When the power is given to executors to be executed in their official capacity of executors, and there are no words in the will warranting the conclusion that the testator intended, for safety or some other object, a joint execution of the power, as the office survives the power, it ought also to be construed as surviving": *Peter v. Beverly*, 10 Pet. 532, 563.

¹ *Rubottom v. Morrow*, 24 Ind. 202; 87 Am. Dec. 324.

² *Twitty v. Lovelace*, 97 N. C. 54; and see title *Purchaser*, *post*.

³ *Harlan v. Brown*, 2 Gill, 475; 41 Am. Dec. 436.

⁴ *Meador v. Sorsby*, 2 Ala. 712; 36 Am. Dec. 432.

⁵ *Hay v. Mayer*, 8 Watts, 203; 34 Am. Dec. 453.

⁶ *Marr v. Peay*, 2 Murph. 84; 5 Am. Dec. 521.

⁷ *Bruch v. Lantz*, 2 Rawle, 392; 21 Am. Dec. 458. But see *Lockwood v. Stradley*, 1 Del. Ch. 298; 12 Am. Dec. 97.

⁸ So held in *Shippen v. Clapp*, 36 Pa. St. 89.

The direction to sell contained in a will carries with it the power to make a valid transfer of such title as the testator had,¹ and a license to sell is unnecessary where the executor has a power to sell under the will;² nor in fact where a sale is authorized or directed in the will. The executor is bound to sell; he has no discretion. The will is the law of the trust and the measure of his obligations.³

§ 928. **Duties of Executors and Administrators.**—The right of an administrator depends upon his grant of power from a proper tribunal.⁴ The duty of burial is upon the executor, and in his absence or neglect, the law implies a promise from him to remunerate one who incurs the expense of such burial.⁵ But it is held that the duty of the administratrix as to the body of the dead terminates with the burial.⁶ An executor may also make necessary repairs on the monument or tomb of the testator.⁷ So the executor should administer upon estate undevise, although this duty is not incumbent upon the administrator *cum testamento annexo*.⁸

The executor and administrator are bound to exercise the utmost good faith, and such prudence and caution in the administration as a judicious man looking to his own interests would exercise in regard to his own affairs, and also to act fairly and honestly in dealings with third persons in respect to the estate.⁹ They are further bound to do nothing which has a tendency to interfere with a strict performance of the trust imposed upon them. If they make a profit by the use of the funds of the estate, the profit belongs to the estate. The policy

¹ *Peebles v. Watts's Adm'r*, 9 Dana, 102; 33 Am. Dec. 531; *Bond v. Zeigler*, 1 Ga. 324; 44 Am. Dec. 656.

² *Going v. Emery*, 16 Pick. 107; 26 Am. Dec. 645.

³ *Bond v. Zeigler*, 1 Ga. 324; 44 Am. Dec. 656.

⁴ *Vroom v. Van Horne*, 10 Paige, 549; 42 Am. Dec. 94.

⁵ *Patterson v. Patterson*, 59 N. Y. 574; 17 Am. Rep. 384.

⁶ *Wynkoop v. Wynkoop*, 42 Pa. St. 293; 82 Am. Dec. 506.

⁷ *Bell v. Briggs*, 63 N. H. 592.

⁸ *Dean v. Biggers*, 27 Ga. 73; *Venable v. Mitchell*, 29 Ga. 566.

⁹ *Bailey v. Dilworth*, 10 Smedes & M. 404; 48 Am. Dec. 760; *Able v. Chandler*, 12 Tex. 88; 62 Am. Dec. 518.

of the law is to prevent them from being placed in a position which would bias them against a discharge of their duties.¹ It is their further duty to protect the interests of creditors by using every effort to make the property in their hands sell at the best price.² They are also under obligations to diligence in preparing for distribution, and must use due and reasonable efforts to collect debts due the estate.³ But this does not require them to enforce doubtful claims at the expense of the estate without being indemnified for costs.⁴

It is also their duty, when making sales by order of the court, to sell for ready money. A sale on the purchaser's personal security is such a breach of duty as that they are liable if a loss ensue; and the fact that prudence and good faith were exercised affords no excuse in such case of loss.⁵ They are further bound to object to all claims and demands against the estate not legally and properly authenticated.⁶ Their duty also extends beyond the mere execution of legacies, and requires them to pay all just and legal claims of the testator or intestate.⁷ And their duty to pay a bank's claims in its own paper when purchasable at a discount has been held to be incumbent on them if payment can be made in such manner.⁸ Nor should they make distribution until after the due administration of the estate as the law requires, this duty is imposed upon them.⁹ An administrator of an intestate pensioner should also receive and pay over pensions due • from the United States.¹⁰

¹ *Mosely v. Lane*, 27 Ala. 62; 62 Am. Dec. 752.

² *Pearson v. Moreland*, 7 Smedes & M. 609; 45 Am. Dec. 319.

³ *Charlton's Appeal*, 34 Pa. St. 473; 75 Am. Dec. 673. See *Sarah v. Gardner*, 24 Ala. 719.

⁴ *Sanborn v. Goodhue*, 28 N. H. 48; 59 Am. Dec. 398.

⁵ *Foster v. Thomas*, 21 Conn. 285.

⁶ *Walker v. Byers*, 14 Ark. 246.

⁷ *Meissonier v. Laurent*, 14 La. Ann. 14. As to payment by administrator

to himself as guardian, see *Wilson v. Wilson*, 17 Ohio St. 150; 91 Am. Dec. 125.

⁸ *Wingate v. Pool*, 25 Ill. 118.

⁹ *Union Bank v. McDonogh*, 7 La. Ann. 232; *Thomas v. Riegel*, 5 Rawle, 148; *McIntosh v. Hambleton*, 35 Ga. 95; 89 Am. Dec. 276; *McNair's Appeal*, 4 Rawle, 148; *Dean v. Portis*, 11 Ala. 104.

¹⁰ *Chapman v. Loveland*, 11 Ohio St. 214.

So all covenants of the testator, except those which are personal, bind, as a general rule, the executor;¹ though they may exercise their discretion as to performance or rescission of the testator's personal contracts under sanction of the court.² But the duty to perform contracts does not require them to complete the proposals of the deceased;³ and their obligation to take care of the interests of all concerned as much requires them to see that the remainderman is not deprived of his interest as that the tenant for life should enjoy his.⁴

An executor and trustee is bound to carry into effect the trusts of a will, so far as they are valid and consistent with the rules of law, unless excused from literal performance by the consent of all persons interested, and by the sanction of the court of chancery when the rights of infants and married women are concerned.⁵ The administrator of the domicile should also, if possible, get possession of assets situate elsewhere.⁶ And such administrator is bound to pay the claims of non-resident creditors if he takes out letters and receives assets in their state, and if any balance remains, to remit the same to the administration of the domicile.⁷

No obligation devolves, however, upon an administrator to pay off encumbrances merely to benefit the estate, especially where such encumbrance is one for which the estate is not liable.⁸

¹ *Petrie v. Voorhees*, 18 N. J. Eq. 235.

² *Dougherty v. Stephenson*, 20 Pa. St. 210; *Gray v. Hawkins*, 8 Ohio St. 449; 72 Am. Dec. 600. See *Bland v. Umstead*, 23 Pa. St. 316.

³ *Phipps v. Jones*, 20 Pa. St. 260; 59 Am. Dec. 708.

⁴ *Saunders v. Haughton*, 8 Ired. Eq. 217; 57 Am. Dec. 581.

⁵ *Wood v. Wood*, 5 Paige, 596; 23 Am. Dec. 451.

⁶ *Fletcher v. Sanders*, 7 Dana, 345; 32 Am. Dec. 96.

⁷ *Richards v. Dutch*, 8 Mass. 506; *Normand v. Grogard*, 17 N. J. Eq. 425; *Davis v. Estey*, 8 Pick. 475; *Mitchell v. Cox*, 23 Ga. 32. It is not his duty, however, to take out letters in all cases in another state, where a debt there may be due the intestate, but his duties in this respect must be determined by the exigencies in each case: *Williams v. Williams*, 79 N. C. 417; 23 Am. Rep. 330.

⁸ *Estate of Knight*, 12 Cal. 200; 73 Am. Dec. 531.

§ 929. **Authority and Rights of Executors and Administrators.**—All acts of an administrator done in due course of the administration are valid and binding upon the estate, though the letters be afterwards revoked, and though the administration had been obtained by fraudulently suppressing a will.¹ While at common law an executor might take possession and dispose of the property of the deceased, sell the same, appropriate it to the payment of debts, bring actions relative to the property which the deceased actually had in his possession, and do almost any acts connected with his office,² yet under the statutes of most of the states, "any acts done by an executor by way of disposing of the property are invalid unless he takes out letters testamentary, or is appointed executor by an order of the court of probate equivalent to the issue of such letters."³ His authority extends, however, only to administering the estate according to law,⁴ or according to the will, although a final settlement thereby becomes impossible within the statutory limit of time.⁵

An administrator may sell or pledge personal property of the estate for all purposes connected with the discharge of his duties under the will.⁶ Executors and administrators have authority to release debts,⁷ or a money demand,⁸ or to execute a release.⁹ They may also

¹ *Foster v. Brown*, 1 Bail. 221; 19 Am. Dec. 672.

² *Williams on Executors*, 293, 302, 303, 629; *Wall v. Bissell*, 125 U. S. 382, 387.

³ *Wall v. Bissell*, 125 U. S. 382, 387; citing *Monroe v. James*, 4 Munt. 194; *Martin v. Peck*, 2 Yerg. 298; *Cleveland v. Chandler*, 3 Stew. 489; *Carpenter v. Going*, 20 Ala. 587; *Ex parte Maxwell*, 37 Ala. 362, 364; *Kittredge v. Folsom*, 8 N. H. 98, 111; *Rand v. Hubbard*, 4 Met. 252, 257; *Gay v. Minot*, 3 Cush. 352; *Carter v. Carter*, 10 B. Mon. 327; *Stagg v. Green*, 47 Mo. 500; *Hartnett v. Wandell*, 60 N. Y. 346, 350; 19 Am. Rep. 194; *McDearmon v. Max-*

well, 38 Ark. 631. See also *Tappan v. Tappan*, 30 N. H. 50; *Arnold v. Arnold*, 13 Ired. 174; 55 Am. Dec. 434.

⁴ *Hall v. Hall*, 27 Miss. 458.

⁵ *Scott v. West*, 63 Wis. 529.

⁶ *Smith v. Ayer*, 101 U. S. 320. So he may pledge notes as security for the payment of a judgment: *Pickens v. Yarbrough's Admr.*, 26 Ala. 417; 62 Am. Dec. 728.

⁷ *Murray v. Blatchford*, 1 Wend. 583; 19 Am. Dec. 537; *Shaw v. Berry*, 35 Me. 279; 58 Am. Dec. 702.

⁸ *Ewing v. Handley*, 4 Litt. 346; 14 Am. Dec. 140.

⁹ *Caldwell v. McVicar*, 12 Ark. 746.

collect, transfer, indorse, assign, and otherwise dispose of notes of the estate;¹ may sell and convey choses in action of the deceased,² or assign the same.³ They may also make a judicious and beneficial compromise with a debtor;⁴ may agree that a judgment may be taken;⁵ may incur debts properly chargeable as a reasonable expense for the benefit of the estate;⁶ may tender a deed executed by the deceased in his lifetime and authorized under the will to be delivered;⁷ may discharge an encumbrance upon property of an insolvent estate when the interest of the estate is thereby promoted;⁸ and an assent to or the payment of a legacy by an executor before the grant of letters does not bind the estate, unless, perhaps, the probate and appointment operates to bar a further claim by the legatee.⁹

The authority of an executor or administrator in the disposition of assets is limited ordinarily to the discharge of legal obligations due from the estate, and does not ex-

¹ *Sanders v. Blain's Adm'rs*, 6 J. J. Marsh. 446; 22 Am. Dec. 86; *Hough v. Bailey*, 32 Conn. 288; *McKay v. St. Mary's Church*, 15 R. I. 121; 2 Am. St. Rep. 881; *Latta v. Miller*, 109 Ind. 302; *Speelman v. Culbertson*, 15 Ind. 441; *Makepeace v. Moore*, 10 Ill. 474; *Wilson v. Doster*, 7 Ired. Eq. 231; *Thomas v. Reister*, 3 Ind. 369; *Walker v. Craig*, 18 Ill. 116.

² *Petersen v. Chemical Bank*, 32 N. Y. 21; 88 Am. Dec. 298.

³ *Ladd v. Wiggin*, 35 N. H. 421; 69 Am. Dec. 551.

⁴ *Bailey v. Dilworth*, 10 Smedes & M. 404; 48 Am. Dec. 760; *Wyman's Appeal*, 13 N. H. 18; *Todd v. Terry*, 26 Mo. App. 698; *Kee v. Kee*, 2 Gratt. 116. But see *Lucich v. Medin*, 3 Nev. 93, 93 Am. Dec. 376, as to consent of the court being requisite to warrant a compromise of a suit.

⁵ "An executor or administrator can, in the exercise of his judgment, pay a debt proved against the estate. If he may pay the debt, it is difficult to see why, when suit is brought, he may not agree that judgment may be taken": *Brown v. Brown*, 56 Conn.

249, 255; citing *Emerson v. Thompson*, 16 Mass. 429; *Hill v. Buckminster*, 5 Pick. 391; *Faunce v. Gray*, 21 Pick. 245; *Phillips v. County of Middlesex*, 127 Mass. 262; *Eckhart v. Triplett*, 48 Ind. 174; 17 Am. Rep. 735; *Church v. Howard*, 79 N. Y. 415, 418; *Lawson v. Powell*, 31 Ga. 681; 79 Am. Dec. 296. See *Estate of Isaacs*, 30 Cal. 105.

⁶ *Price v. McIver*, 25 Tex. 769; 78 Am. Dec. 558. See *Lucht v. Behrens*, 28 Ohio St. 231; 22 Am. Rep. 378.

⁷ *Rearich v. Swinehart*, 11 Pa. St. 233. As to deed made by executrix, see *Morrison v. Bowman*, 29 Cal. 337.

⁸ *McNeill v. McNeill*, 36 Ala. 109; 76 Am. Dec. 320. But he cannot do so after the encumbered property has been sold, when there is no liability upon him on account of the defective title: *McNeill v. McNeill*, 36 Ala. 109; 76 Am. Dec. 320. Nor may he do so unless the intestate was bound to pay the money, although equity might authorize the expenditure to prevent a sacrifice: *Estate of Knight*, 12 Cal. 200; 73 Am. Dec. 531.

⁹ *Pinkham v. Grant*, 78 Me. 158; *Gardner v. Gantt*, 19 Ala. 666.

tend to the payment of demands for which the estate is not liable, nor to the appropriation of the assets to the widow or heirs.¹

Ordinarily, an executor has no power over the real estate except such as he derives from the will, and consequently cannot divert or impair the rights of the heirs by unauthorized acts;² so an administrator cannot bind such estate by his warranty, or render the estate responsible in damages for frauds or torts committed by him;³ nor is he ordinarily entitled to collect the rents of the realty, unless, perhaps, when the estate is insolvent;⁴ and since he has no seisin, therefore he cannot be disseised;⁵ nor has he any concern with bequests charged as annuities on the realty;⁶ nor can an administrator of an insane grantee avoid a deed to him, and recover the consideration paid.⁷ But his control does not terminate with the possession of the tenant for life, but after her death he may take possession of the estate with its increase, and administer it in accordance with the will.⁸ And an agreement by an administratrix to sell real estate at a private sale for a certain sum, or to procure an order of court for the sale though it cannot bind the estate, is not necessarily invalid as against public policy.⁹

Executors and administrators cannot waive the benefit of a statute intended for the protection of the estate;¹⁰ nor can they incur liabilities which will bind the estate in the hands of an administrator *de bonis non* by carrying

¹ Ripley v. Sampson, 10 Pick. 371; Washburn v. Hale, 10 Pick. 429. As to authority of executor to dispose of assets, see note to Petrie v. Clark, 14 Am. Dec. 641. As to authority to loan funds of the estate, see Abbott's Ex'r v. Reeves, 49 Pa. St. 494; 88 Am. Dec. 510.

² Brush v. Ware, 15 Pet. 93.

³ Lynch v. Baxter, 4 Tex. 431; 51 Am. Dec. 735; Able v. Chandler, 12 Tex. 88; 62 Am. Dec. 518; Hale v. Marquette, 69 Iowa, 377.

⁴ Scudder v. Ames, 89 Mo. 496; Gregg v. Currier, 36 N. H. 200.

⁵ Knowles v. Blodgett, 15 R. I. 463; 2 Am. St. Rep. 913.

⁶ Robinson v. McIver, 63 N. C. 645.

⁷ Campbell v. Kuhn, 45 Mich. 513; 40 Am. Rep. 479.

⁸ Smith v. Granberry, 39 Ga. 381; 99 Am. Dec. 464.

⁹ Stuart v. Allen, 16 Cal. 473; 76 Am. Dec. 551.

¹⁰ Dawes v. Shed, 15 Mass. 6; 8 Am. Dec. 80.

on the business of decedent;¹ nor may they borrow money for the estate, unless expressly authorized by the will.²

An executor's and administrator's authority terminates with the acceptance of his resignation and appointment of his successor;³ and the authority of an administrator *cum testamento annexo* is limited to the estate disposed of by the will.⁴

When an administrator sells land of his intestate, and takes a note, with sureties and a mortgage, for the purchase-money, and they afterwards become the property of the minor heirs as part of their inheritance, the administrator has no right to cancel the old note, take a new one, and release the mortgage, to the prejudice of the heirs.⁵ Where an executor or administrator gives a note payable to a third person in consideration of services to be rendered the estate, it does not bind the estate;⁶ and where a person has a right to hold goods as a consignee, or to purchase them, and elects the former, and dies, his executor cannot elect to take them as a purchaser, and if he attempts to do so, he is guilty of a conversion.⁷

ILLUSTRATIONS. — The executor of an estate who was not authorized to do so took the personal assets of his testator and used them in carrying on the former trade and business of the testator for a series of years, for the purpose of making money to be used in paying the debts and supporting the family of the testator, consisting of a widow and minor children, and also for the purpose of keeping up the business for the minor sons when they should be old enough to take charge of it, and in so doing paid off all the debts of the testator. *Held*, that the general assets of the testator in the hands of the administrator *de bonis non* were not liable for money borrowed by the executor for and

¹ *Lucht v. Behrens*, 28 Ohio St. 231; 22 Am. Rep. 378.

² *Lucich v. Medin*, 3 Nev. 93; 93 Am. Dec. 376.

³ *Oldham v. Smith*, 26 Tex. 530. See *Patton's Appeal*, 31 Pa. St. 465.

⁴ *Harper v. Smith*, 9 Ga. 461. See *Montgomery v. Millikin*, 5 Smedes & M. 151; 43 Am. Dec. 507; *Owens v. Cowan*, 7 B. Mon. 152; *Moody v. Van-*

dyke, 4 Binn. 31; 5 Am. Dec. 385; *Montague v. Carneal*, 1 A. K. Marsh. 351.

⁵ *Smith v. Dibrell*, 31 Tex. 239; 98 Am. Dec. 526.

⁶ *Price v. McIver*, 25 Tex. 769; 78 Am. Dec. 558.

⁷ *Bacon v. Sondley*, 3 Strob. 542; 51 Am. Dec. 646.

used in carrying on such trade and business, though the executor acted in good faith: *Lucht v. Behrens*, 28 Ohio St. 231; 22 Am. Rep. 378.

§ 930. Authority of Co-executors, etc. — Extraterritorial Authority, etc. — The authority of co-executors, executors *de son tort*, *de bonis non*, and the like, as well as the authority of executors beyond the limits of their own state, will be considered hereafter.¹

§ 931. Authority to Make Contracts. — Under the general powers and authority vested in executors and administrators, they cannot make or enter into any contract which will bind the estate of the decedent. All contracts made with them are personal.²

§ 932. Authority to Submit to Arbitration. — It is a general rule that executors and administrators may enter into arbitrations, and their acts will be upheld in such case if they are fair, beneficial to the estate, and free from fraud, negligence, or misconduct.³ Though it is held that

¹ See *Foreign Executors and Administrators, etc.*, secs. 978-981.

² *Fitzhugh's Ex'rs v. Fitzhugh*, 11 Gratt. 300; 62 Am. Dec. 653; *Jones v. Jenkins*, 2 McCord, 494; *McEldery v. McKenzie*, 2 Port. 33; 27 Am. Dec. 643; *May v. May*, 7 Fla. 207; 68 Am. Dec. 431; *Sims v. Stillwell*, 4 Miss. 176; *Snead v. Coleman*, 7 Gratt. 300; 56 Am. Dec. 112; *Miller v. Williamson*, 5 Md. 219; *Mason v. Caldwell*, 5 Gilm. 196; 48 Am. Dec. 330; *Nehbe v. Price*, 2 Nott & McC. 328; *Underwood v. Millegan*, 10 Ark. 254; *Pinckney v. Singleton*, 2 Hill (S. C.), 343; *Pearce v. Smith*, 2 Brev. 360; 4 Am. Dec. 588; *Davis v. French*, 20 Ma. 21; 37 Am. Dec. 36. But see *Brightwell v. Jordan*, 74 Ga. 486; *Harrison v. Harrison*, 39 Ala. 489; *Meeker v. Vanderveer*, 15 N. J. L. 392; *Long v. Schackelford*, 25 Miss. 559; *Bruner's Appeal*, 57 Pa. St. 46. An administrator or creditor can derive no greater benefits from his contracts with other persons, or from the equitable relation in which he stood during his lifetime

to them, than the deceased would be entitled to if still living: *Fletcher v. Grover*, 11 N. H. 368; 35 Am. Dec. 497. The contracts of guardians and administrators with wards and distributees are regarded with suspicion by courts of equity, and an administrator's purchase of a distributee's interest soon after his coming to full age, and for a grossly inadequate consideration, is fraudulent: *Wright v. Arnold*, 14 B. Mon. 638; 61 Am. Dec. 172.

³ *Bailey v. Dilworth*, 10 Smedes & M. 404; 48 Am. Dec. 760; 2 Woerner on American Law of Administration, secs. 327, 390; *Nelson v. Cornwell*, 11 Gratt. 724; *Kendall v. Bates*, 35 Me. 357; *Peter's Appeal*, 38 Pa. St. 239; *Crum v. Moore*, 14 N. J. Eq. 436; 82 Am. Dec. 262; *Schouler on Executors and Administrators*, sec. 387, and notes; *Childs v. Updyke*, 9 Ohio St. 333; *Dickinson v. Dutcher*, Brayt. 104; *Chadbourne v. Chadbourne*, 9 Allen, 173. See Co-executors, secs. 975-977, and Statute of Frauds, sec. 969.

such executor or administrator is bound by the award,¹ and that if the award injures the estate, he is liable as for a *devastavit*.² And in submitting the claim to arbitration, it is decided that it is not necessary that the word of office be appended to the signature, where the character in which the submission is made fully appears in the paper or instrument of submission;³ and where a submission to arbitration is made, the court will reluctantly interfere with the discretion of the administrator to refer a controversy to arbitration.⁴

The submission of a matter to arbitration was formerly regarded as an admission of assets by an executor, but it is said not to be so now, since it is merely considered as a mode of ascertaining matters on which the parties cannot agree.⁵

§ 933. Authority in Relation to Mortgages.—In the absence of an authorization by will or by force of some statute, executors and administrators have no right to mortgage the real estate of the decedent.⁶ So an administrator has no authority to mortgage decedent's real estate to extinguish the mortgagee's dower right in other portions.⁷

The title of heirs is not affected by a foreclosure sale,⁸ as a foreclosure of the mortgage and sale of the property

Contra, examine *Reitzell v. Muller*, 25 Ill. 67; and as to a rejected claim, see *Yarborough v. Leggett*, 14 Tex. 677; see also, *contra*, *Clark v. Hogle*, 52 Ill. 427; *Harrington v. Rich*, 6 Vt. 666.

¹ *Crum v. Moore*, 14 N. J. Eq. 436; 82 Am. Dec. 263; but see 2 *Woerner on American Law of Administration*, sec. 327, and cases.

² *Nelson v. Cornwell*, 11 Gratt. 724.

³ *Chadbourne v. Chadbourne*, 9 Allen, 173.

⁴ *Crum v. Moore*, 14 N. J. Eq. 436; 82 Am. Dec. 262.

⁵ *Konigsmacher v. Kimmel*, 1 Pen. & W. 207; 21 Am. Dec. 374.

⁶ *Deery v. Hamilton*, 41 Iowa, 16; *Smith v. Hutchinson*, 108 Ill. 662; *Black v. Dressell*, 20 Kan. 153. See Mass. Pub. Stats., c. 134, secs. 19, 20; 2 *Woerner on American Law of Administration*, sec. 345. As to the power of courts of equity to authorize a mortgage, see *Spencer v. Bank*, Bail. Eq. 468. As to mortgage of personal estate, see *Wilson v. Doster*, 7 Ired. Eq. 231; *Salmon v. Clagett*, 3 Bland, 125; *Parker v. Gilliam*, 10 Yerg. 394; *Colt v. Lasnier*, 9 Cow. 320.

⁷ *Green v. Sargeant*, 23 Vt. 466; 56 Am. Dec. 88.

⁸ *Walbridge v. Day*, 31 Ill. 379; 83 Am. Dec. 227.

under execution are not such acts as admit away the heir's title.¹

Where an administrator sells real estate under an order of the probate court, and takes a mortgage of the same for purchase-money, a foreclosure of the mortgage vests the estate in him personally, but a subsequent conveyance by him as administrator will pass his title, and he becomes personally bound by the covenants in such conveyance.² If an assignment of a mortgage is made to administrators of an estate as such, the presumption arises, in the absence of proof *contra*, that it was made upon a consideration paid by the estate.³ In Indiana an executor has no authority, as trustee or otherwise, to redeem a mortgage of real estate where he has never qualified nor been appointed.⁴

An administrator by taking a mortgage on the land of his intestate admits some kind of title in the mortgagor, but if such administrator afterwards sells the mortgagor's title to satisfy the mortgage, he does not thereby merge the legal or equitable title of the heirs in that of the mortgagor.⁵

§ 934. Admissions by Executor or Administrator. — Declarations, admissions, and promises of an executor or administrator, made after he is clothed with his fiduciary character, will bind the estate.⁶ But this rule does not apply to admissions of a former administrator;⁷ nor to admissions made after the expiration of an administration;⁸ nor to admissions by any administrator made before his appointment;⁹ nor can an estate be prejudiced

¹ Walbridge v. Day, 31 Ill. 379; 83 Am. Dec. 227.

² Higley v. Smith, 1 D. Chip. 409; 12 Am. Dec. 701.

³ Fluck v. Hager, 51 Pa. St. 459; 91 Am. Dec. 132.

⁴ Wall v. Bissell, 125 U. S. 382.

⁵ Walbridge v. Day, 31 Ill. 379; 83 Am. Dec. 227.

⁶ Neal v. Lamar, 18 Ga. 746; Law-

son v. Powell, 31 Ga. 681; 79 Am. Dec. 296; Sample v. Liscomb, 18 Ga. 687; Matoon v. Clap, 8 Ohio, 248; Floyd v. Wallace, 31 Ga. 688, 692. See Godbee v. Sapp, 53 Ga. 283.

⁷ Eckert v. Triplett, 48 Ind. 174; 17 Am. Rep. 735.

⁸ Lacoste v. Bexar Co., 28 Tex. 420.

⁹ Gaines v. Alexander, 7 Gratt. 257; Thomasson v. Driskell, 13 Ga. 253.

or estopped by the mere silence of the administrator, or by his omission to assert title or to do an act in relation to its interests.¹

The admission of a sole executor may take away the bar of the statute of limitations.² But the admission must be an unqualified one, where its aid is sought to remove the bar of the statute against a note.³

ILLUSTRATIONS. — In an action by an administrator *de bonis non* to recover the value of goods sold by his intestate to the defendant, the defendant pleaded payment to a former administration. *Held*, that evidence of the admissions of such former administration that payment had been made to him was competent: *Eckert v. Triplett*, 48 Ind. 174; 17 Am. Rep. 735.

§ 935. Sales by Executors and Administrators — General Power to Sell. — Administrators have power to sell all property of their intestate, including his choses in action.⁴ Such sale may be by special act as well as under the general law;⁵ and the power to sell lands for the payment of debts is not taken away by an alienation by descent from or disseisin of the heirs or devisees.⁶ But if the personal representative desires to sell the real estate, he must be authorized so to do by authority of the proper court, by virtue of a jurisdiction conferred by statute.⁷ This power to sell becomes a duty on the failure of personal assets, if debts are remaining unpaid.⁸

¹ *Lewis v. Lusk*, 35 Miss. 696; 72 Am. Dec. 153.

² *Townes v. Ferguson*, 20 Ala. 147.

³ *Buswell v. Roby*, 3 N. H. 467; *Deyo v. Jones*, 19 Wend. 491. See title Co-executors, secs. 975-979.

⁴ *Beecher v. Buckingham*, 18 Conn. 110; 44 Am. Dec. 580. Exceptions to this general power exist in cases where collusion exists between the representatives and the purchaser: *Bond v. Zeigler*, 1 Ga. 324; 44 Am. Dec. 656.

⁵ *Williamson v. Williamson*, 3 Smeds & M. 715; 41 Am. Dec. 636.

⁶ *Willard v. Nason*, 5 Mass. 240; *Drinkwater v. Drinkwater*, 4 Mass.

354. *Examine Gore v. Brazier*, 3 Mass. 523; 3 Am. Dec. 182.

⁷ *White v. Beard*, 5 Port. 94; 30 Am. Dec. 552; *Fallon v. Butler*, 21 Cal. 24; 81 Am. Dec. 140; *Goforth v. Longworth*, 4 Ohio, 129; 19 Am. Dec. 588. May sell lands, in New Hampshire, under a license, whether the estate be solvent or insolvent: *Goodall v. Marshall*, 11 N. H. 88; 35 Am. Dec. 472. An administrator making sale of land is a mere officer of the court: *Robb v. Mann*, 11 Pa. St. 300; 51 Am. Dec. 551.

⁸ *Union Bank v. Powell*, 3 Fla. 175; 52 Am. Dec. 367. See *Alexander v. Maverick*, 18 Tex. 179; 67 Am. Dec. 693; *Lucich v. Medin*, 3 Nev. 93; 93 Am. Dec. 376.

§ 936. **Power of Court to Order Sale.** — The probate court has no power to order a sale of land until the jurisdictional facts and acts prescribed by law have been judicially ascertained of record.¹ Such power of the court also depends upon the further fact that there is not sufficient personal property to pay debts of the estate.²

The jurisdiction of the court also depends, in addition, upon the presentation by the legal and regular appointee of the petition prescribed by law, and an account of the personal estate, and of the debts of the estate.³ Such petition must allege a valid ground for the order of sale, otherwise the order of sale is of no validity;⁴ but only jurisdictional facts are, however, required to be stated in the petition;⁵ nor, it is held, is a written petition a necessary requisite.⁶

Since the power to order a sale of the decedent's real estate is conferred by statute, the requisites prescribed by the statute must be strictly complied with in all the preliminary as well as subsequent proceedings on which the order of sale is based;⁷ and this rule requires that due

¹ *Root v. McFerrin*, 37 Miss. 17; 75 Am. Dec. 49. That court has power to order sale, see *Tucker v. Harris*, 13 Ga. 1; 58 Am. Dec. 488.

² *Stuart v. Allen*, 16 Cal. 473; 76 Am. Dec. 551. That decedent's will directed a sale of the property is no ground for an order of sale by the probate court: *Wilson v. Armstrong*, 42 Ala. 168; 94 Am. Dec. 635. The court may order more property sold than is necessary to pay the debts set out in the petition: *Tenney v. Poor*, 14 Gray, 500; 77 Am. Dec. 340.

³ *Long v. Burnett*, 13 Iowa, 28; 81 Am. Dec. 420; *Schneider v. McFarland*, 4 Barb. 139; *Sanford v. Granger*, 12 Barb. 392; *Bloom v. Burdick*, 1 Hill, 130; 37 Am. Dec. 299; *Jackson v. Crawford*, 12 Wend. 533; *Atkins v. Kinnan*, 20 Wend. 241; 32 Am. Dec. 534. Such account cannot be dispensed with because an inventory has previously been filed: *Bloom v. Burdick*, 1 Hill, 130; 37 Am. Dec. 299.

⁴ *Wilson v. Armstrong*, 42 Ala. 168;

94 Am. Dec. 635; *Sermon v. Black*, 79 Ala. 507.

⁵ *Field's Heirs v. Goldsby*, 28 Ala. 218; 65 Am. Dec. 341.

⁶ *Alexander's Heirs v. Maverick*, 18 Tex. 179; 67 Am. Dec. 693. As to character of proceeding on a petition to sell real estate, see *Beckett v. Selover*, 7 Cal. 216; 68 Am. Dec. 237.

⁷ *Ikelheimer v. Chapman*, 32 Ala. 676; *Hall v. Chapman*, 35 Ala. 553; *Wyatt v. Rambo*, 29 Ala. 510; 68 Am. Dec. 89; *Gelstrop v. Moore*, 26 Miss. 206; 59 Am. Dec. 254; *Kempe v. Pintard*, 32 Miss. 324; *Worten v. Howard*, 2 Smedes & M. 527; 41 Am. Dec. 607; *Brown v. Brown*, 41 Ala. 215; *Stevenson v. McReary*, 12 Smedes & M. 9; 51 Am. Dec. 102; *Clements v. Henderson*, 4 Ga. 148; 48 Am. Dec. 216; *Wyman v. Campbell*, 6 Port. 219; 31 Am. Dec. 677; *Gibson v. Roll*, 27 Ill. 88; 81 Am. Dec. 219; *Worthy v. Johnson*, 8 Ga. 236; 52 Am. Dec. 399. A literal compliance does not seem to be required in California: *Stuart v.*

and legal notice of the application for an order to sell should be given to the heirs and other parties legally entitled to notice, and such notice must be published and given in the mode and manner which the statute prescribes.¹ It is held that where no special form of notice is required by the statute, the notice is sufficient when a reasonable person, in the exercise of his ordinary faculties, would, by reading the same, be apprised by it in what court and at what time the petition would be presented.²

ILLUSTRATIONS. — A statute required notice to be published "three weeks successively." *Held*, that a publication on some day on each of the three successive weeks was sufficient: *Morrow v. Weed*, 4 Iowa, 77; 66 Am. Dec. 122. Notice of the term at which petition is to be heard is sufficient, without a particular day being specified: *Finch v. Sink*, 46 Ill. 169; 92 Am. Dec. 246; *Goudy v. Hall*, 36 Ill. 313; 87 Am. Dec. 217. It is irregular for an administrator who is also sheriff to serve notice on the heirs: *Overton v. Cranford*, 7 Jones, 415; 78 Am. Dec. 244. Where the statute requires notice to be published for four successive weeks in a paper designated by the court, and it is published three weeks in a paper so designated, and the fourth week in a paper designated by the administra-

Allen; 16 Cal. 473; 76 Am. Dec. 551. And it is also held that this rule may be relaxed in favor of innocent purchasers: *Worthy v. Johnson*, 8 Ga. 236; 52 Am. Dec. 399. The rule stated in the text particularly applies where a special and extraordinary power is conferred upon the court by statute: *Currie v. Stewart*, 27 Miss. 52; 61 Am. Dec. 500. And such rule specially applies where jurisdiction over minor heirs is required: *Clark v. Thompson*, 47 Ill. 25; 95 Am. Dec. 457.

¹ *Valle v. Fleming*, 19 Mo. 454; 61 Am. Dec. 566; *Gibson v. Roll*, 30 Ill. 172; 83 Am. Dec. 181; *Walbridge v. Day*, 31 Ill. 379; 83 Am. Dec. 227; *Mitchell v. Bowen*, 8 Ind. 197; 65 Am. Dec. 758; *Root v. McFerrin*, 37 Miss. 17; 75 Am. Dec. 49; *French v. Hoyt*, 6 N. H. 370; 25 Am. Dec. 464; *Adams v. Jeffries*, 12 Ohio, 253; 40 Am. Dec. 477; *Bloom v. Burdick*, 1 Hill, 130; 37 Am. Dec. 299. The sufficiency of the notice is determined by the

court: *Gibson v. Roll*, 27 Ill. 88; 81 Am. Dec. 219; *Monk v. Horne*, 38 Miss. 100; 75 Am. Dec. 94. The wife of a devisee of real estate is not entitled to notice: *Harrington v. Harrington*, 13 Gray, 513; 74 Am. Dec. 648. Such notice need not contain the names of infant claimants if the statute be followed: *Gibson v. Roll*, 27 Ill. 88; 81 Am. Dec. 219. It is held that a substantial compliance with the statute as to notice is sufficient in *Jackson v. Astor*, 1 Pinn. 137; 39 Am. Dec. 281. Failure to comply literally with the statutory requisites in publication of citations is cured by an uninterrupted possession for a long period of years: *Stevenson v. McReary*, 12 Smedes & M. 9; 51 Am. Dec. 102; *Jackson v. Astor*, 1 Pinn. 137; 39 Am. Dec. 281.

² *Finch v. Sink*, 46 Ill. 169; 92 Am. Dec. 246; *Goudy v. Hall*, 36 Ill. 313; 87 Am. Dec. 217.

tor, a sale based thereon is void, although the first paper had ceased publication before the last notice was given: *Townsend v. Tallant*, 33 Cal. 45; 91 Am. Dec. 617. Where the order of sale directs six weeks' notice of the sale to be given, a shorter notice will render the sale void: *Reynolds v. Wilson*, 15 Ill. 394; 60 Am. Dec. 753.

§ 937. **Hearing on Petition for Sale.**—An heir may dispute the validity of claims upon which a petition for the sale of real estate of a decedent is based, although such claims may have been allowed by the public administrator or by the probate judge.¹ But conflicting titles to land cannot be adjudicated,² and the sufficiency of the evidence to warrant the issuance of a license to sell the decedent's realty is a matter within the discretion of the probate judge.³

An order for the sale of real estate is not void because it omits to show that the application for the order was accompanied by the certificate of the judge of probate required by law to be produced with such application.⁴ When the petition is in good form, and the order recites "that it appears to the satisfaction of the court that it is necessary to sell said land," this is a sufficient statement of the reason for making the order.⁵ A description of land in order of sale as ninety-one acres of the southwest corner of lot No. 11 is not fatally defective, if the deceased owned that number of acres, and no more, in the lot so described.⁶

§ 938. **What the Order of Sale must Show.**—An order of sale must show affirmatively a compliance with all the statutory requirements upon which the sale is based; that is, the jurisdictional facts must appear, and the record must also show the necessity of the sale, and that the

¹ *Beckett v. Selover*, 7 Cal. 216; 68 Am. Dec. 237.

² *Harding v. Le Moyne*, 114 Ill. 65.

³ *Merrill v. Harris*, 26 N. H. 142; 57 Am. Dec. 359.

⁴ *Jackson v. Astor*, 1 Pinn. 137; 39 Am. Dec. 281.

⁵ *Cox v. Davis*, 17 Ala. 714; 52 Am. Dec. 199.

⁶ *Bloom v. Burdick*, 1 Hill, 130; 37 Am. Dec. 299.

application was legally made by the party authorized.¹ But mere recitals in the decree cannot of itself give jurisdiction.²

§ 939. **Nature of Sale.**—An administrator's sale is judicial, and operates *in rem*.³

§ 940. **What may be Sold.**—The court may ordinarily decree the sale of any interest in the land of the decedent, no matter whether it be a legal or equitable interest; even mere inchoate equities may be sold, provided, always, that a legal necessity exists for such sale for the payment of debts.⁴

Resulting trusts may be sold;⁵ so may an equity of redemption in the estate.⁶ Under a decree of the probate court directing the sale of "the lands and mills belonging to the estate of the deceased," it is competent to sell any real estate or mills belonging to the deceased within the county.⁷ Estates in remainder or reversion are such interests as warrant a sale.⁸ So are executory contracts for sale of realty.⁹ But no valid sale of any real estate may be made under a decree authorizing the executor to sell so much real estate as he may deem for the best interests of the estate.¹⁰

¹ Wyatt's Adm'r v. Rambo, 29 Ala. 510; 68 Am. Dec. 89; Tucker v. Harris, 13 Ga. 1; 58 Am. Dec. 488; Stevenson v. McReary, 12 Smedes & M. 9; 51 Am. Dec. 102; Martin v. Williams, 42 Miss. 210; 97 Am. Dec. 456. Although it is held that the validity of such sale is not affected by the fact that the record does not show that a petition was made, the presumption being that it was made: Alexander v. Maverick, 18 Tex. 179; 67 Am. Dec. 693. See title Purchaser, etc., post.

² Saltonstall v. Riley, 28 Ala. 164; 65 Am. Dec. 334.

³ Moore v. Shultz, 13 Pa. St. 98; 53 Am. Dec. 446; Halleck v. Guy, 9 Cal. 181; 70 Am. Dec. 643; Sackett v. Twining, 18 Pa. St. 199; 57 Am. Dec.

599; Lynch v. Barter, 4 Tex. 431; 51 Am. Dec. 735; Saltonstall v. Riley, 28 Ala. 164; 65 Am. Dec. 334.

⁴ 2 Woerner on American Law of Administration, sec. 471; Bolling v. Jones, 67 Ala. 508, 516; Williams v. Ratcliffe, 42 Miss. 145.

⁵ Valle v. Bryan, 19 Mo. 423, 425.

⁶ Kenley v. Bryan, 110 Ill. 652; Jackson v. Magruder, 51 Mo. 55; Biggs v. Bickel, 12 Ohio St. 49.

⁷ Monk v. Horne, 38 Miss. 100; 75 Am. Dec. 94.

⁸ Williams v. Ratcliffe, 42 Miss. 145.

⁹ Williams v. Stratton, 10 Smedes & M. 418; but see Hendrickson v. Hendrickson, 41 N. J. Eq. 375.

¹⁰ Morris v. Hogle, 37 Ill. 150; 87 Am. Dec. 243.

§ 941. **By Whom Sale should be Made.**—The sale of real estate of the decedent, upon order of court, should be made by the administrator personally, or by his agent in his presence.¹

§ 942. **Proceeds of Sale should be Money.**—It may be stated, as a general rule, that where sale is made of the estate under an order of court, the administrator can receive nothing but money in payment therefor, and if he receives security and it becomes valueless, he is liable.²

§ 943. **Employment of Bidder at Sale.**—A bidder may be employed at an administrator's sale when the employment of such bidder is with the *bona fide* intention of preventing the sacrifice of the property, and not for the purpose of enhancing the price above its true value, and where the purchaser is not thereby induced to bid more than the property is worth, although the employment of a puffer at such sale is ordinarily considered a fraud on the purchaser.³

§ 944. **Bonds Relating to Sales.**—In some states, a bond is required of administrators before they are permitted to sell real estate, although this does not seem to be a requisite in all states.⁴ If a bond is taken by the administrator upon the sale of the estate, it is held that it is the property of the estate, at least so until the settlement of the administration account.⁵

¹ Sebastian v. Johnson, 72 Ill. 282; 22 Am. Rep. 144, and note 145.

² Chandler v. Schoonover, 14 Ind. 324; and see Liability of Executor and Administrator, sec. 995; Hoke v. Hoke, 12 Va. 427; Hudgens v. Cameron, 50 Ala. 379; Biscoe v. Moore, 12 Ark. 77; Parham v. Stith, 56 Miss. 465.

³ Reynolds v. Dechaums, 24 Tex. 174; 76 Am. Dec. 101; Pennock's Appeal, 14 Pa. St. 446; 53 Am. Dec. 561.

⁴ Nelson v. Jaques, 1 Me. 139; Rucker v. Dyer, 44 Miss. 591; Clay v. Foxworthy, 18 Neb. 295; Worgang v.

Clipp, 21 Ind. 119; 83 Am. Dec. 343; Currie v. Stewart, 27 Miss. 52; 61 Am. Dec. 500; Strother v. Hull, 23 Gratt. 652, 668; Hannum v. Day, 105 Mass. 33; Hamilton v. Lockhart, 41 Miss. 460; Foster v. Birch, 17 Mich. 238. See Tenney v. Poor, 14 Gray, 500; 77 Am. Dec. 340. Such bond, being for the faithful performance of the new duty, can only cover the neglect of duty in the administration of proceeds of such sale: Worgang v. Clipp, 21 Ind. 119; 83 Am. Dec. 343.

⁵ Pulliam v. Winston, 5 Leigh, 324.

§ 945. **The Order of Sale as to its Terms must be Followed.**—Where an order of sale of the real estate of the decedent prescribes the mode and terms of the sale, it is the duty of the appointee under the grant of letters to strictly conform to its requirements; he has no discretion to exercise in the matter.¹

ILLUSTRATIONS.—An executor under an order to sell real estate sold a greater quantity than the license authorized. *Held*, that the sale was invalid: *Wakefield v. Campbell*, 20 Me. 393; 37 Am. Dec. 60. So an administrator can make no terms with a purchaser at the sale which are not warranted by the order or by law: *Hamilton v. Pleasants*, 31 Tex. 638; 98 Am. Dec. 551. Decree was for sale of all decedent's real estate. *Held*, that a part might be sold: *Ewing v. Higby*, 7 Ohio, 198; 28 Am. Dec. 633.

§ 946. **Jurisdiction of Court to Set Aside Sales.**—A void order of sale may be vacated by order of the probate court, even at a subsequent term.² So it may be set aside for fraud, as in case a purchaser at such sale has been enabled through a fraudulent decree of the administration to bid in the property at much less than its real value.³ So the court may set aside a fraudulent sale on application before final settlement of the estate.⁴ And it is held that notice to the purchaser at the fraudulent sale is not necessary to enable the court to set aside such sale and order the property resold.⁵

Fraud in a probate sale does not exist because an attorney at law held claims against the estate for collection, and used all legal efforts to obtain an order of sale of

¹ *Reynolds v. Wilson*, 15 Ill. 394; 60 Am. Dec. 753; *Wyman v. Campbell*, 6 Port. 219; 31 Am. Dec. 677; *Lockwood v. Sturdevant*, 6 Conn. 373; *Wiley v. White*, 8 Stew. & P. 355; and see note to *Wakefield v. Campbell*, 37 Am. Dec. 65. An unauthorized sale by an administrator is treated as his individual act: *Worthy v. Johnson*, 10 Ga. 358; 54 Am. Dec. 393.

² *Summersett v. Summersett*, 40 Ala. 596; 91 Am. Dec. 494.

³ *Planters' Bank v. Neely*, 7 How. (Miss.) 80; 40 Am. Dec. 51.

⁴ *Hart v. Hart*, 39 Miss. 221; 77 Am. Dec. 668. Even after a lapse of twenty-one years, such sale never having been confirmed: *Hart v. Hart*, 39 Miss. 221; 77 Am. Dec. 668. As to avoidance of sale of real estate for irregularity of proceedings, see *Norman v. Olney*, 64 Mich. 553.

⁵ *Pearson v. Moreland*, 7 Smedes & M. 609; 45 Am. Dec. 319.

property of the estate to provide for their payment, and at the sale became himself the purchaser of the property sold.¹ The mere silence of an administrator in respect to the title, although he may know it to be defective, is held not to amount to such fraud as vitiates the sale.²

§ 947. **Who Entitled to have Sale Annulled.**—It is held that a mere intruder or trespasser is not entitled to have a sale of real estate set aside.³ Nor have legatees a right to a decree vacating such sale, except so far as may be necessary to protect their interests.⁴ But a purchaser may have the sale set aside for good cause.⁵

§ 948. **Curing Irregularities.**—The terms of an orphans' court sale are part of a judicial decree to be made by the court, and may therefore be amended or modified by the court at any time before the record is made up and closed.⁶ But the court has no jurisdiction to allow an amendment to a decree of sale made upon the petition of the administrator himself when the statute allowing amendments only contemplates one at the instance of the purchaser of the real estate;⁷ and where judgment of sale has been rendered by the court, it cannot after the adjournment of that term render another and different judgment upon the same record without further pleadings, suggestions, or evidence.⁸

§ 949. **Confirmation and Ratification of Sale.**—The probate court can only confirm those sales which are made under orders which it had jurisdiction to make.⁹

¹ *Giddings v. Steele*, 28 Tex. 733; 91 Am. Dec. 336.

² *Thompson v. Munger*, 15 Tex. 523; 65 Am. Dec. 176.

³ *Wimberly v. Hurst*, 33 Ill. 166; 83 Am. Dec. 295.

⁴ *Buckles v. Lafferty*, 2 Rob. (Va.) 292; 40 Am. Dec. 752. As to duty of court before setting aside sales in favor of legatees, see *Buckles v. Lafferty*, 2 Rob. (Va.) 292; 40 Am. Dec. 752.

⁵ *Coombs v. Lane*, 17 Tex. 280; *Shields v. Allen*, 77 N. C. 375.

⁶ *Monk v. Horne*, 38 Miss. 100; 75 Am. Dec. 94.

⁷ *Lee v. Williams*, 85 Ala. 189.

⁸ *Bethel v. Bethel*, 6 Bush, 65; 99 Am. Dec. 655.

⁹ *Gregory v. Taber*, 19 Cal. 397; 79 Am. Dec. 219. See *Haynes v. Meeks*, 20 Cal. 314.

The confirmation of a sale of the decedent's real estate follows the duty of the executor or administrator to make report of his doings, and such confirmation is a legal necessity to make the sale complete, and to pass a valid title to the estate sold.¹

In determining whether a sale should be confirmed, only those questions can be considered which the statute makes material;² and there can be no valid confirmation by the probate court of a private sale of realty of decedent;³ nor may a void sale be confirmed;⁴ but where the administrator has altered the terms of the sale, the confirmation of such sale cures the irregularity,⁵ and an irregularity in the order of confirmation does not invalidate the sale;⁶ though where the price is grossly inadequate, confirmation may be refused.⁷

In Alabama, it is said that the ratification of a commissioner's sale is a test of its correctness.⁸ It is also held that by a confirmation of an administrator's sale his liability to the heirs for the purchase-money becomes fixed, and he acquires thereby the right to recover from the purchaser.⁹ Upon the question of illegal sales, it is declared that each of the heirs and their assignees has an individual election to avoid or confirm an illegal sale made by an administrator or executor.¹⁰ But in determining what is a ratification of a sale, it is held that a receipt by distributees of decedent's estate of the proceeds of an

¹ *Henry v. McKerlie*, 78 Mo. 416; *Smith v. Wert*, 64 Ala. 34; *Halliburton v. Sumner*, 27 Ark. 460; *Moore v. Neil*, 39 Ill. 256, 263; 89 Am. Dec. 303; *Mitchell v. Bliss*, 47 Mo. 353; *Pool v. Ellis*, 64 Miss. 555; *Apel v. Kelsey*, 47 Ark. 413; *Yerly v. Hill*, 16 Tex. 377; *Neill v. Cody*, 26 Tex. 286; *Wallace v. Hall*, 19 Ala. 367; *Rea v. McEachron*, 13 Wend. 465; 28 Am. Dec. 471; 2 *Woerner on Law of Administration*, sec. 478.

² *Meadows v. Meadows*, 81 Ala. 451.

³ *Stuart v. Allen*, 16 Cal. 473; 76 Am. Dec. 551.

⁴ *Bethel v. Bethel*, 6 Bush, 65; 99 Am. Dec. 665. See *Scott v. Gorton*, 14 La. 115; 33 Am. Dec. 578.

⁵ *Jacob's Appeal*, 23 Pa. St. 477. See also, as to irregularities being cured by confirmation, *Sankey's Appeal*, 55 Pa. St. 491.

⁶ *Gelstrop v. Moore*, 26 Miss. 206; 59 Am. Dec. 254.

⁷ *Terry v. Coles*, 80 Va. 695.

⁸ *Field's Heirs v. Goldsby*, 23 Ala. 218; 65 Am. Dec. 341.

⁹ *Sackett v. Twining*, 18 Pa. St. 199; 57 Am. Dec. 599.

¹⁰ *Ramick v. Butterfield*, 31 N. H. 70; 64 Am. Dec. 316.

unauthorized sale will not operate as a ratification of the sale, unless such distributees were of lawful age at the time of receiving the proceeds, and were cognizant of the facts.¹

§ 950. **Valid Sales.** — A license granted to an executor to sell real property is valid though the debts have not been determined either by a judgment of court or a commission of insolvency,² and such sale is valid whether the order was passed on a good reason or no reason;³ nor can such sale be avoided because made by a surviving administrator upon letters granted to him and another after the death of his co-administrator, and without any express revocation of the former letters;⁴ nor is such sale invalid because of a mere irregularity;⁵ and all intendments and presumptions will be rather in favor of the validity of a sale than otherwise.⁶

ILLUSTRATIONS. — An entry was made upon the minutes of the probate court that the administrator's final account be admitted and filed and be discharged upon paying costs, but the authority of the administrator continues to be recognized by the court, and the order disregarded by all parties and the administration proceeded with. *Held*, that a sale based upon an order made after such entry was valid: *Alexander's Heirs v. Maverick*, 18 Tex. 179; 67 Am. Dec. 693.

§ 951. **Void Sales.** — We have already seen what are the requisites necessary to constitute a valid sale, and it would follow that if such requisites are wanting, the sale is void as a general rule, except as noted in the preceding text. Other matters, however, arise outside of the validity of the orders themselves, since the order may be valid and sale yet be void, as where there is collusion between

¹ *McArthur v. Carrie*, 32 Ala. 75; 70 Am. Dec. 529. See *Valle v. Fleming*, 19 Mo. 454; 61 Am. Dec. 566.

² *Tenney v. Poor*, 14 Gray, 500; 77 Am. Dec. 340.

³ *Doe v. Roe*, 30 Ga. 961.

⁴ *Valle v. Fleming*, 19 Mo. 454; 61 Am. Dec. 566.

⁵ *Schnell v. Chicago*, 38 Ill. 382; 87 Am. Dec. 304.

⁶ *Clements v. Henderson*, 4 Ga. 148; 48 Am. Dec. 216; *Sims v. Gay*, 109 Ind. 501; *Doolittle v. Holton*, 28 Vt. 819; 67 Am. Dec. 745; *Saxon v. Cain*, 19 Neb. 488.

the administrator and the vendee of the goods or estate of the deceased.¹ So the sale is void where, although the order was obtained in due time, but was not acted upon until the statute of limitations had run against the debts which made such sale necessary.² So where the administrator has turned the property over to the legatee, his power to sell it ceases.³ So where the administrator does not conform to the terms of the order,⁴ or where the law under which the order is based is repealed before the sale is made,⁵ or where enough has been raised to pay the debts, further sales are null.⁶ So such sale is void where the only title to the land sold is a fraudulent and worthless certificate of purchase.⁷

A sale is void where an order is made to sell property bequeathed, unless necessary for its preservation.⁸ An order to the administrator *cum testamento annexo* to sell lands acquired by the testator after the execution of the will has been held void.⁹ A sale is void when the necessary circumstances do not exist to warrant it.¹⁰ A license to sell the whole of decedent's real estate, and a public notice for the sale of the whole, does not concur with a petition to sell a specified portion of said realty, and is void.¹¹ A sale of personal property under an order void for want of jurisdiction is void against a subsequent administrator to the one who made the sale.¹² Where a second administrator makes a sale, and the record shows that his appointment was totally unnecessary, by reason of the fact that the estate had been fully administered,

¹ Tippet v. Mize, 30 Tex. 361; 94 Am. Dec. 313; Swink v. Snodgrass, 17 Ala. 653; 52 Am. Dec. 190; Carroll v. Cockerham, 38 La. Ann. 813.

² Campau v. Gillett, 1 Mich. 416; 53 Am. Dec. 73.

³ McCants v. Bee, 1 McCord Ch. 383; 16 Am. Dec. 610.

⁴ Adams v. Morrison, 4 N. H. 166; 17 Am. Dec. 406.

⁵ Campau v. Gillett, 1 Mich. 416; 53 Am. Dec. 73.

⁶ Wells v. Mills, 22 Tex. 302.

⁷ Smith v. Dibrell, 31 Tex. 239; 98 Am. Dec. 526.

⁸ Joslin v. Caughlin, 26 Miss. 134.

⁹ Meador v. Sorsby, 2 Ala. 712; 36 Am. Dec. 432.

¹⁰ Withers v. Patterson, 27 Tex. 491; 86 Am. Dec. 643.

¹¹ Verry v. McClellan, 6 Gray, 535; 66 Am. Dec. 423.

¹² Wyatt's Adm'r v. Rambo, 29 Ala. 510; 68 Am. Dec. 89.

except for purposes of partition and distribution, such sale is void.¹ So a sale for the payment of debts, when none are proved, is void.² Sales made without any order of court are void.³ So where the record shows that the oath required by law was not taken, or that notice was not given, the sale is void.⁴ So a sale is held to be void where there is failure to give the required bond.⁵

§ 952. Conveyance by Executor or Administrator.—

An administrator's deed gives color of title, though the anterior proceedings be irregular, and it establishes the grantor's right to the use and enjoyment of the land as against third persons who have no title.⁶ Such deed conveys whatever estate the decedent possessed at his death, and gives sufficient title to enable the grantee to hold his estate as against a disseisor, and to sue and recover the same as against him.⁷ But such conveyance passes no greater interest than the deceased himself possessed,⁸ and the deed of an executor or administrator can contain no covenant of warranty, express or implied, which will bind the estate, although this rule does not preclude them from making a personal obligation of this kind.⁹

Such deed must, if the statute requires, set forth at large the order and proceedings under which the sale was

¹ Withers v. Patterson, 27 Tex. 491; 86 Am. Dec. 643.

² Davenport v. Young, 16 Ill. 548; 63 Am. Dec. 320.

³ Ware v. Houghton, 41 Miss. 370; 93 Am. Dec. 258.

⁴ Thornton v. Mulquinne, 12 Iowa, 549; 79 Am. Dec. 548; Campbell v. Knights, 26 Me. 224; 45 Am. Dec. 107.

⁵ Williamson v. Williamson, 3 Smedes & M. 715; 41 Am. Dec. 636; but see *contra*, Wyman v. Campbell, 6 Port. 219; 31 Am. Dec. 677.

⁶ Cheswell v. Chapman, 38 N. H. 14; 75 Am. Dec. 158.

⁷ Knowles v. Blodgett, 15 R. I. 463; 2 Am. St. Rep. 913.

⁸ Adams v. Cuddy, 13 Pick. 460; 25

Am. Dec. 330. If the conveyance does not purport to convey any estate or interest except that of the administrator or executor, it does not convey any estate of the deceased: Davenport v. Young, 16 Ill. 548; 63 Am. Dec. 320.

⁹ Williams v. McDonald, 13 Tex. 322; Worthy v. Johnson, 8 Ga. 236; 52 Am. Dec. 399; Halleck v. Guy, 9 Cal. 181; 70 Am. Dec. 643; Ware v. Houghton, 41 Miss. 370; 93 Am. Dec. 258. As to conveyances by administrators and executors, and the form and contents of same, see note to Jones v. Taylor, 56 Am. Dec. 55. As to covenants in such conveyances, see note to Allen v. Sayward, 17 Am. Dec. 224.

made, otherwise it is invalid.¹ But it is held that it need not recite at length such decree or proceedings in the suit on which the sale and conveyance was based.²

§ 953. **Purchaser's Rights under Sale.**—“Inasmuch as the authority given to an executor and administrator to sell is a personal trust, and exists only by virtue of statutory provisions, the authority must be strictly pursued, and unless every essential direction of the law is complied with, no title passes against those whose interests are affected by the authority to sell, unless from long acquiescence a presumption arises that all the requisites of the law have been complied with. . . . It being the rule that no warranty of title is implied in sales by executors, administrators, or trustees, the maxim *caveat emptor* applies in regard to title. . . . Therefore, sales by an executor or administrator are void if made without order of court or in any manner not authorized by law, and property so sold may be recovered by the distributees or legatees from the parties holding it under the sale. . . . But it is said that the rule that executors making sales of personal property must comply strictly with the statutory provisions concerning them may be somewhat relaxed in favor of innocent purchasers.”³ A purchaser from an administrator acting in violation of his trust with knowledge of such violation acquires no title.⁴ And a *bona fide*

¹ *Atkins v. Kinnan*, 20 Wend. 241; 32 Am. Dec. 534.

² *Jones v. Taylor*, 7 Tex. 240; 56 Am. Dec. 48. See further, as to recitals, *Knowlton v. Smith*, 36 Mo. 507; 88 Am. Dec. 152; *Pearson v. Burditt*, 26 Tex. 157; 80 Am. Dec. 649; *Backenstoss v. Stahler's Adm'rs*, 33 Pa. St. 251; 75 Am. Dec. 592.

³ Note to *Velsian v. Lewis*, 3 Am. St. Rep. 204; *Worthington v. McRoberts*, 9 Ala. 297; *Beene v. Collenberger*, 38 Ala. 647; *Lynch v. Baxter*, 4 Tex. 431; 51 Am. Dec. 735; *Owen v. Slatter*, 26 Ala. 547; 62 Am. Dec. 745;

Burns v. Hamilton's Adm'r, 33 Ala. 210; 70 Am. Dec. 570; *Halleck v. Guy*, 9 Cal. 181; 70 Am. Dec. 643; *Thompson v. Munger*, 15 Tex. 523; 65 Am. Dec. 176; *Cogan v. Frisby*, 36 Miss. 178; *Robb v. Mann*, 11 Pa. St. 300; 51 Am. Dec. 551; *Sackett v. Twining*, 18 Pa. St. 199; 57 Am. Dec. 599; *Gray v. Gardner*, 3 Mass. 399; *Leverett v. Armstrong*, 15 Mass. 26. As to when purchase is valid, see note to *Sutherland v. Brush*, 11 Am. Dec. 386.

⁴ *Swink v. Snodgrass*, 17 Ala. 653; 52 Am. Dec. 190.

purchaser from an executor having no power to sell acquires no title.¹ But a *bona fide* purchaser at a public sale by an executor *de son tort* acquires an actual possession good against the world.² And one who is a *bona fide* purchaser cannot, after the sale is confirmed, be affected in a collateral suit by the fact that the executor failed to file a bond.³ But no title passes upon a private sale of the personal estate of intestate.⁴ So no title passes where the grant of administration is void.⁵ But persons purchasing at a void administrator's sale will be declared trustees for the parties injured.⁶ It is said, however, that the rule of *caveat emptor* does not apply to a void sale of land, because the only title is a fraudulent certificate of purchase.⁷

Another statement, or rather a reason of the above rule, is this: in all sales by an administrator or executor, he acts under a decretal order of court, and the purchaser at his own peril is required to ascertain the grounds and authority of the fiduciary, not from his declaration at the time of the sale, but from the orders of court and the statutes of the state in regard to his special duties in the premises.⁸ Under such sale, while only such title is vested in the purchaser as the decedent had, yet that same title is vested.⁹ But if the warrant is regular on its face, the pur-

¹ *Williamson v. Williamson*, 3 Smedes & M. 715; 41 Am. Dec. 636; *Worthing v. Johnson*, 8 Ga. 236; 52 Am. Dec. 399.

² *Woolfork v. Sullivan*, 23 Ala. 548; 58 Am. Dec. 305.

³ *Norman v. Olney*, 64 Mich. 553.

⁴ *Wior v. Davis*, 4 Ala. 442; *McArthur v. Carrie*, 32 Ala. 75; 70 Am. Dec. 529; *Bogan v. Camp*, 30 Ala. 75; *Gaines v. De la Croix*, 6 Wall. 719. *Contra*, *Winns v. Alexander*, 2 Dev. & B. Eq. 58; *Tyrrell v. Morris*, 1 Dev. & B. Eq. 559.

⁵ *Withers v. Patterson*, 27 Tex. 491; 86 Am. Dec. 643.

⁶ *Williamson v. Williamson*, 3 Smedes & M. 715; 41 Am. Dec. 636.

⁷ *Roehl v. Pleasants*, 31 Tex. 45; 98

Am. Dec. 514. A purchaser at the sale who has his deed first recorded will gain the same preference over an unrecorded deed as if he had bought directly from the debtor himself: *Tucker v. Harris*, 13 Ga. 1; 58 Am. Dec. 488. Though an administrator's deed not recorded in the county where the land lies must yield to the title of a *bona fide* purchaser from a voluntary grantee of the intestate whose deed is first on record: *Choteau v. Jones*, 11 Ill. 300; 50 Am. Dec. 460.

⁸ *Hamilton v. Pleasants*, 31 Tex. 638; 98 Am. Dec. 551.

⁹ *Owen v. Slatler*, 26 Ala. 547; 62 Am. Dec. 745; *Bickley v. Biddle*, 33 Pa. St. 276; *Sackett v. Twining*, 18 Pa. St. 199; 57 Am. Dec. 599.

chaser is protected.¹ It is the further duty of a purchaser at an administrator's sale to measure the land before the sale is confirmed; if he does not, he cannot obtain any deduction from a bond given for the price by reason of there being a less quantity than he supposed.² The purchaser is also bound to bear any loss that may happen to the premises, even before confirmation of the sale;³ but he is not bound to see to the application of the purchase-money, except, perhaps, in special cases.⁴ He is liable, however, for the difference between his bid and the diminished price obtained at a resale, where he refuses to complete his purchase according to the terms of sale.⁵

A fraudulent representation by the executor or administrator at the sale will entitle the purchaser to refuse to complete the sale or pay the purchase-money.⁶ But ignorance of the legal effect of known facts affecting the title affords no ground for relief,⁷ and a collusive vendee may not recover back the price paid;⁸ though a *bona fide* purchaser of succession property without notice of a community claim is entitled to be reimbursed for expenditures and taxes;⁹ and a purchaser may retain property against the heirs when obtained under a sale authorized by them, although such sale was otherwise void.¹⁰ So an innocent purchaser is not responsible for errors, mere irregularities, and omissions of the officers intrusted with the keep-

¹ *Overton v. Cranford*, 7 Jones, 415; 78 Am. Dec. 244; *Withers v. Patterson*, 27 Tex. 491; 86 Am. Dec. 643.

² *Sackett v. Twining*, 18 Pa. St. 199; 57 Am. Dec. 599.

³ *Robb v. Mann*, 11 Pa. St. 300; 51 Am. Dec. 551.

⁴ *Bond v. Zeigler*, 1 Ga. 324; 44 Am. Dec. 656; *Petrie v. Clark*, 11 Serg. & R. 377; 14 Am. Dec. 636; *Meeks v. Thompson*, 8 Gratt. 134; 56 Am. Dec. 134.

⁵ *Sproul v. Seay*, 74 Ga. 676; *Mount v. Brown*, 33 Miss. 566; 69 Am. Dec. 362.

⁶ *Williamson v. Walker*, 24 Ga. 257;

71 Am. Dec. 119; *Able v. Chandler*, 12 Tex. 88; 62 Am. Dec. 518. The failure to execute a deed to the purchaser on the day specified in the conditions of sale affords no ground for rescission: *Robb v. Mann*, 11 Pa. St. 300; 51 Am. Dec. 551.

⁷ *Haynes v. Meeks*, 10 Cal. 110; 70 Am. Dec. 703. An administrator cannot treat a sale to a purchaser who refuses to complete his purchase as valid, and sue him for the amount of his bid: *Mount v. Brown*, 33 Miss. 566; 69 Am. Dec. 362.

⁸ *Forniquet v. Forstall*, 34 Miss. 87.

⁹ *Oriol v. Moss*, 38 La. Ann. 770.

¹⁰ *Grande v. Chaves*, 15 Tex. 550.

ing of the records in the probate court, or because of errors which do not go to the jurisdiction.¹

§ 954. **Purchase of the Estate by Executor or Administrator.**—The decisions upon the point whether an executor or administrator may purchase the property of the estate on which he is appointed and acting are certainly conflicting. There is no doubt, however, but that the *cestui que trust* may, upon a proper showing, in equity be entitled to have the sale or purchase set aside, even though the sale may have been at public auction.² It has been held that such purchase may be made where the sale is not conducted by the administrator himself.³ It is even declared in certain cases to be his duty to purchase, as where it is necessary to prevent a sacrifice of the property.⁴ So it is held that upon paying the appraised value the administrator may obtain the property of the estate;⁵ and also that a purchase at his own sale by the executor or administrator is *prima facie* valid.⁶ In another case it is held that he takes the estate by such purchase subject to the trusts to which it was liable before the sale;⁷ or in other words, that the purchase inures to benefit of the estate.⁸

¹ *Dancy v. Stricklinge*, 15 Tex. 557; 65 Am. Dec. 179; *Valle v. Fleming*, 29 Mo. 152; 77 Am. Dec. 557; *Moore v. Neil*, 39 Ill. 256; 89 Am. Dec. 303. A stranger cannot take advantage of such irregularities to defeat a purchaser's title: *Overton v. Cranford*, 7 Jones, 415; 78 Am. Dec. 244.

² *Worthy v. Johnson*, 8 Ga. 236; 52 Am. Dec. 399; *Shine v. Redwine*, 30 Ga. 780; *Boyd v. Blankman*, 29 Cal. 19; 87 Am. Dec. 146; *Bailey v. Robinsons*, 1 Gratt. 4; 42 Am. Dec. 540; *Sheldon v. Woolbridge*, 2 Root, 473; *McCartney v. Calhoun*, 17 Ala. 301; *Lyon v. Lyon*, 8 Ired. Eq. 201. See *Mead v. Byington*, 10 Vt. 116; *Booraem v. Wells*, 19 N. J. Eq. 87; *Lothrop v. Wightman*, 41 Pa. St. 297; *Stallings v. Foreman*, 2 Hill Ch. 401. But an heir who elects to repudiate such sale must do so in a reasonable

time: *Flanders v. Flanders*, 23 Ga. 249; 68 Am. Dec. 523. So it is held that fraud in making such purchase and sale must be shown to invalidate it: *Erskine v. De la Baum*, 3 Tex. 406; 49 Am. Dec. 751.

³ *Dillinger v. Kelley*, 84 Mo. 561.

⁴ *Clark v. Clark*, 8 Paige, 152; 35 Am. Dec. 676.

⁵ *Mitcherson v. Mercer*, 6 J. J. Marsh. 381; *Miller v. Towles*, 4 J. J. Marsh. 255. See *Lindsay v. Lindsay*, 1 Desaus. 150.

⁶ *McLane v. Spence*, 6 Ala. 894; *Anderson v. Fox*, 2 Hen. & M. 245; *Brannan v. Oliver*, 2 Stew. 47; 19 Am. Dec. 37; *Blount v. Davis*, 2 Dev. 19.

⁷ *Bruch v. Lantz*, 2 Rawle, 392; 21 Am. Dec. 458.

⁸ *Fellows v. Fellows*, 4 Cow. 682; 15 Am. Dec. 412; *Falls v. Torrence*, 4 Hawks, 412.

Other cases, however, hold that such purchase is absolutely void under all circumstances, even though made with the utmost fairness, or at public auction.¹ The rule, however, which seems to be more in consonance with equity and practice, is that which holds such purchases to be only voidable and liable to be set aside on a proper showing by the *cestui que trust*. That they are voidable only is held in numerous cases.²

§ 955. Actions by Executors and Administrators — What Actions may be Sustained by Them. — As a general rule, an executor or administrator may sue in his representative capacity whenever the money, if received, would be assets in his hands.³ Such suit may be maintained on showing title in the deceased and his own possession as administrator.⁴ So he may sue in his own name.⁵ He may bring action for a breach of contract to convey land,⁶ and to recover money collected on notes of the deceased,

¹ *Green v. Sargeant*, 23 Vt. 466; 56 Am. Dec. 88; *Edmonds v. Crenshaw*, 1 McCord Ch. 252; *Glass v. Great-house*, 20 Ohio, 503; *Miles v. Wheeler*, 43 Ill. 123; *Scott v. Gorton*, 14 La. 115; 33 Am. Dec. 578; *Stanbrough's Succession*, 37 La. Ann. 275; *Dwight v. Blackmar*, 3 Mich. 330; 57 Am. Dec. 130; *Jenison v. Hapgood*, 7 Pick. 1; *Martin v. Wyncoop*, 12 Ind. 266; 74 Am. Dec. 209; *Ives v. Ashley*, 97 Mass. 198; *Pearson v. Moreland*, 7 Smedes & M. 609; 45 Am. Dec. 319; *Willenborg v. Murphy*, 36 Ill. 344; *Skillman v. Skillman*, 15 N. J. Eq. 388; *Stiles v. Burch*, 5 Paige, 132; *Fleming v. Foran*, 12 Ga. 594; *Faucett v. Faucett*, 1 Bush, 511; 88 Am. Dec. 639; *Singstack v. Harding*, 4 Har. & J. 186; 7 Am. Dec. 669; *Marshall v. Carson*, 38 N. J. Eq. 250; 48 Am. Rep. 319; *Barnes v. McGee*, 1 Smedes & M. 208; *Woodruff v. Cook*, 2 Edw. 259; *Harrod v. Norris*, 11 Mart. (La.) 297; 13 Am. Dec. 350; *Chronister v. Bushey*, 7 Watts & S. 152; *Ryden v. Jones*, 1 Hawks, 497; 9 Am. Dec. 660. See *Scott v. Gorton*, 14 La. 115; 33 Am. Dec. 578. As to purchase by

husband of executrix, that tenant of such purchaser cannot attorn to his successor in trust, see *Smith v. Granberry*, 39 Ga. 381; 99 Am. Dec. 464.

² *Worthy v. Johnson*, 8 Ga. 236; 52 Am. Dec. 399; *Pennock's Appeal*, 14 Pa. St. 446; 53 Am. Dec. 561; *Musselman v. Eshleman*, 10 Pa. St. 394; 51 Am. Dec. 493; *Mercer v. Newson*, 23 Ga. 151; *Bland v. Muncaster*, 24 Miss. 62; 57 Am. Dec. 162; *Harrington v. Brown*, 5 Pick. 519; *Buckles v. Lafferty*, 2 Rob. (Va.) 292; 40 Am. Dec. 752; *Smith v. Granberry*, 39 Ga. 381; 99 Am. Dec. 464; *Boyd v. Blankman*, 29 Cal. 19; 87 Am. Dec. 146. See generally, on this subject, note to *Van Dyke v. Johns*, 12 Am. Dec. 85.

³ *Sasscer v. Walker*, 5 Gill & J. 102; 25 Am. Dec. 272; *Lawson v. Lawson*, 16 Gratt. 230; 80 Am. Dec. 702.

⁴ *Ikellheimer v. Chapman*, 32 Ala. 676; *Sims v. Boynton*, 32 Ala. 353; 70 Am. Dec. 540; *Gage v. Johnson*, 20 Me. 437.

⁵ *Id.*; and see illustrations.

⁶ *Shaw v. Wilkins*, 8 Humph. 647; 49 Am. Dec. 692.

together with the interest on such money.¹ He may sue for money arising from a wrongful sale of a devisee's interest in land,² or to recover money due on a note of the decedent,³ or to recover money of the estate paid before his appointment;⁴ may maintain an action to set aside a conveyance made by the intestate in fraud of creditors.⁵ They may also sue for use and occupation;⁶ may enforce a mortgage;⁷ may maintain trespass against the heir for cutting wood, etc., upon premises on which the decedent, as mortgagee, has obtained a foreclosure.⁸ So an action for trespass or tort survives to them;⁹ they may bring trover for wrongful conversion of goods, or an action for the proceeds of their sale;¹⁰ may, in Kentucky, maintain actions for personal injury;¹¹ may maintain ejectment,¹² even though the property has been sold under an order of court since the action was commenced.¹³ They may also maintain detinue;¹⁴ may recover the value of improvements on estate.¹⁵

ILLUSTRATIONS. — One of two co-administrators, who had united in giving bond for execution of trust as such, upon misappropriation of the funds by his co-administrator, brought petition for revocation of appointment of such administrator, then brought petition against him for accounting, and obtained

¹ Allen v. White, 17 Vt. 69.

² Stoner v. Zimmerman, 21 Pa. St. 394.

³ Cook's Ex'r v. Holmes, 29 Mo. 61; 77 Am. Dec. 548.

⁴ Clark v. Pishon, 31 Me. 503.

⁵ Morris v. Morris, 5 Mich. 171; Gibbons v. Peeler, 8 Pick. 254; Brown v. Finley, 18 Mo. 375; Martin v. Root, 17 Mass. 222; Judson v. Connolly, 4 La. Ann. 169; McKnight v. Morgan, 8 Barb. 171.

⁶ Logan v. Caldwell, 23 Mo. 373. Where there is a lease, see Id.

⁷ Copper v. Wells, 1 N. J. Eq. 10; Gibson v. Bailey, 9 N. H. 168.

⁸ Palmer v. Stevens, 11 Cush. 147.

⁹ Middleton v. Robinson, 1 Bay, 58; 1 Am. Dec. 596; Griswold v. Brown, 1 Day, 180; 2 Am. Dec. 71; Stanley v. Gaylord, 1 Cush. 536; 48 Am. Dec. 643.

¹⁰ Upchurch v. Norsworthy, 15 Ala. 705; Potter v. Van Vranken, 36 N. Y. 619.

¹¹ Cowan v. Campbell, 17 B. Mon. 522; 66 Am. Dec. 184. But not so at common law: Blakeney v. Blakeney, 6 Port. 109; 30 Am. Dec. 574.

¹² Carnall v. Wilson, 21 Ark. 62; 76 Am. Dec. 351; Curtis v. Herrick, 14 Cal. 117; 73 Am. Dec. 632; McFarland v. Stone, 17 Vt. 165; 44 Am. Dec. 325; Sutter v. Lackman, 39 Mo. 91; Golding v. Golding, 24 Ala. 122; Burnell v. Maloney, 36 Vt. 636; Russell v. Irwin, 41 Ala. 292; Beaver v. Morrison, 22 Ga. 107; 68 Am. Dec. 486.

¹³ Leshey v. Gardner, 3 Watts & S. 314; 38 Am. Dec. 764.

¹⁴ Leatherwood v. Sullivan, 81 Ala. 458.

¹⁵ Palmer v. Miller, Cheves Eq. 62; 34 Am. Dec. 602.

a decree ordering the money misappropriated to be refunded, and upon execution returned unsatisfied, the surrogate ordered assignment to him of the bond, and authorized him to bring suit in behalf of estate. *Held*, that the action so brought was valid, since although he might be compelled as principal on the bond to indemnify the sureties to the amount of the recovery had, yet he was authorized in his representative capacity to maintain such suit: *Sperb v. McCoun*, 110 N. Y. 605. An appeal bond was given to executors on appeal from a judgment in their favor in such capacity. *Held*, that an action would lie in their favor on such bond: *Sasser v. Walker*, 5 Gill & J. 102; 25 Am. Dec. 272. An executor holds as such a note payable to bearer. *Held*, that he might sue therefor in his own name: *Brooks v. Floyd*, 2 McCord, 364; *Lyon v. Marshall*, 11 Barb. 241. An executor sells property of the estate on credit. *Held*, that he might bring an action in his own name for the price: *Thompson v. Whitmarsh*, 100 N. Y. 35. An administrator agrees by parol to convey land when the purchase-money is all paid. *Held*, that he might recover by action installments that were due thereon: *White v. Beard*, 5 Port. 94; 30 Am. Dec. 552. The death of a person is caused by the negligence of an apothecary in putting up a poison by mistake. *Held*, that his administrator might sue for damages: *Norton v. Sewall*, 106 Mass. 143; 8 Am. Rep. 298.

§ 958. What Actions may not be Sustained by Them.—

A real action cannot be sustained by an administrator as such;¹ nor an action on the case for overflowing and flooding the land of the deceased in his lifetime;² nor an action for waste;³ nor a suit for trespass committed after death of the testator;⁴ nor may the executor of a deceased administrator maintain an action on a mortgage taken by the former during his office to secure the widow's dower;⁵ nor may they maintain an action against heirs for money voluntarily advanced out of their own funds in payment of claims against the estate;⁶ nor can they recover back over-payments to specific legatees upon dis-

¹ *Emerio v. Penniman*, 26 Cal. 119; *Brown v. Strickland*, 32 Me. 174; *Carmichael v. Davis*, 1 Walk. 221.

² *Chalk v. McAlilly*, 10 Rich. 92; *McLaughlin v. Dorsey*, 1 Har. & McH. 224; but see *Howcott v. Warren*, 7 Ired. 20.

³ So held in *Page v. Davidson*, 22 Ill. 112.

⁴ *Aubuchon v. Lory*, 23 Mo. 99.

⁵ *Brooks v. Smyser*, 48 Pa. St. 86.

⁶ *McClure v. McClure*, 19 Ind. 185; *Beaird v. Wolf*, 19 Ill. App. 36; *Foskett v. Wolf*, 19 Ill. App. 33.

covering a deficiency of assets;¹ nor recover assets converted by a prior administrator;² nor claim any rights based upon their collusive action with others;³ nor sue for breach of covenant to convey land to a deceased coveantee.⁴

ILLUSTRATIONS. — Land was sold on a mortgage foreclosure after the death of the mortgagor. *Held*, that the surplus after satisfying the debt was real estate, and that the mortgagor's administrator could maintain no action to recover it: *Dunning v. Ocean National Bank*, 61 N. Y. 497; 19 Am. Rep. 293. The testator gave rents and profits from certain land to his wife for life or widowhood, and to his son until he became of age. *Held*, that before the happening of the events named no action for possession of the land would lie by the executor: *Thompson v. Schenck*, 16 Ind. 194. The administrator had neglected to return a sale of realty for confirmation. *Held*, that he could not maintain an action for the price of the land sold: *Dowling v. Duke*, 20 Tex. 181. An executor had discharged his duty by giving a tenant for life personal property which was bequeathed, and the tenant died. *Held*, that the executor was not entitled to recover the property for the parties entitled thereto, in an action against third parties: *Weeks v. Jewett*, 45 N. H. 540.

§ 957. Actions by and against Executors de Bonis non. —

It is held that such executor may maintain an action to set aside a fraudulent conveyance of his predecessor in office.⁵ So in Alabama, he may recover against such predecessor assets converted, wasted, or misapplied by them,⁶ and may recover assets in the hands of the former administrator,⁷ or sue on promises made by such predecessor in his representative capacity;⁸ but it is held that he cannot sue on a former administrator's bond.⁹

¹ *Somervell v. Somervell*, 3 Gill, 276; 43 Am. Dec. 340.

² *Coleman v. McMurdo*, 5 Rand. 51; *Cheatham v. Burfoot*, 9 Leigh, 580; see also *Oldham v. Collins*, 4 J. J. Marsh. 49; *Smith v. Carrere*, 1 Rich. Eq. 123; *Felts v. Brown*, 7 J. J. Marsh. 147; *Stubblefield v. McRaven*, 5 Smedes & M. 130; 43 Am. Dec. 502.

³ *Johnston v. Lewis*, Rice Eq. 40; 33 Am. Dec. 74; *Armstrong v. Stovall*, 26 Miss. 275. As to the right

of an executor or administrator to impeach or defend on the ground of fraud, see note to *Whitworth v. Thomas*, 3 Am. St. Rep. 740.

⁴ *Thrower v. McIntire*, 4 Dev. & B. 359; 34 Am. Dec. 382.

⁵ *Duffy v. State*, 115 Ind. 351.

⁶ *Eubank v. Clark*, 78 Ala. 73.

⁷ *Stair v. York National Bank*, 55 Pa. St. 364; 93 Am. Dec. 759.

⁸ *Id.*

⁹ *U. S. v. Walker*, 109 U. S. 258.

§ 958. **Co-executors.**—An executor may not sue his co-executor upon a cause of action which he has against the testator;¹ nor may an executor maintain an action at law against his co-executor, based upon an allowance for annual compensation for their services made by the probate court upon their joint application.²

§ 959. **Executors or Administrators of Executors or Administrators.**—It is held that such executor or administrator may not bring an action at law for a *devastavit* of the former executor or administrator.³

§ 960. **Executor de Son Tort.**—One who, as the widow's agent, in good faith sells perishable property of the estate of the deceased husband and accounts for the proceeds is not liable to an administrator afterwards appointed;⁴ but where a wife wrongfully disposed of the intestate effects, whether before or after administration granted, it was held that the administrator might maintain an action therefor;⁵ but an action cannot be sustained against such executor for property which he had lawfully purchased, paid for, and carried away before the death of the intestate.⁶

§ 961. **Administrators de Bonis non.**—Such administrators may sue for property which is not administered;⁷ he may also sue on notes executed to a former administrator as such, and which have come into his hands as

¹ *Martin v. Martin*, 13 Mo. 36; *Saunders v. Saunders*, 2 Litt. 314; *Cole v. Wooden*, 8 N. J. L. 15.

² *Carver v. Hallett*, 26 Ala. 722.

³ *Anthony v. McCall*, 3 Blackf. 86; *Taliaferro v. Bassett*, 3 Ala. 670; *Griffith v. Beasley*, 10 Yerg. 434. But see *Sibley v. Williams*, 3 Gill & J. 52.

⁴ *Perkins v. Ladd*, 114 Mass. 420; 19 Am. Rep. 374.

⁵ *Shaw v. Hallihan*, 46 Vt. 389; 14 Am. Rep. 628.

⁶ *Cook v. Sanders*, 15 Rich. 63; 94 Am. Dec. 139.

⁷ *Sheets v. Pabody*, 6 Blackf. 120; 38 Am. Dec. 132; *Caller v. Boykin*, Minor, 206; *Bain v. Pine*, 1 Hill, 615; *Evans v. Oakley*, 2 Tex. 182; *Harbin v. Levi*, 6 Ala. 399; *Byrd v. Holloway*, 6 Smedes & M. 323; *Patterson v. Bell*, 25 Iowa, 149; *Latta v. Russ*, 8 Jones, 111; *Eure v. Eure*, 3 Dev. 206; *Harney v. Dutcher*, 15 Mo. 89; 55 Am. Dec. 131; *Smith v. Pearce*, 2 Swan, 127; *Kelly v. Kelly*, 9 Ala. 908; 44 Am. Dec. 469; *Salter v. Cain*, 7 Ala. 478.

assets;¹ he may bring an action to set aside a fraudulent sale by the administrator in chief,² and may maintain a suit in the name of the judge of probate, but for his own benefit, against the sureties on the bond of a former administrator to recover a balance shown by the settlement of the final accounts.³ But such administrator has no remedy against an executor for *devastavit* or maladministration of the estate after the latter's discharge;⁴ nor can he maintain an action of *scire facias* upon a judgment on an administrator's bond to recover a balance due from the original administrator.⁵

An action of *assumpsit* cannot be maintained on an implied promise of such administrator to comply with a promise made by a former administrator to pay for services rendered the intestate's estate;⁶ nor to recover money which was the proceeds of a sale by him as administrator in chief.⁷

§ 962. **When Action may be Sustained against Executors and Administrators.** — In general, an executor or administrator is liable as such only for non-performance of those duties he was bound to perform;⁸ they are also declared to be liable on express or implied promises made after the intestate's death.⁹ So an action of trover will lie against them for conversion of the goods or property of the estate.¹⁰ So an administrator's acts may be set aside

¹ *Maraman v. Trunnell*, 3 Met. (Ky.) 146; 77 Am. Dec. 167.

² *Swink v. Snodgrass*, 17 Ala. 653; 52 Am. Dec. 190; *Forniquet v. Forniquet*, 34 Miss. 87. But see *Steele v. Atkinson*, 14 S. C. 154; 37 Am. Rep. 728.

³ *Judge of Probate v. Claggett*, 36 N. H. 381; 72 Am. Dec. 314. See also *State v. Porter*, 9 Ind. 342; *Stewart v. Phenice*, 65 Iowa, 475. Where such administrator and his sureties are liable on their bond for proceeds of sale of real estate, see *Shalter and Ebling's Appeal*, 43 Pa. St. 83; 82 Am. Dec. 552.

⁴ *Stubblefield v. McRaven*, 5 Smedes & M. 130; 43 Am. Dec. 502.

⁵ *Potts v. Smith*, 3 Rawle, 361; 24 Am. Dec. 359.

⁶ *Pearce v. Smith*, 2 Brev. 360; 4 Am. Dec. 588.

⁷ *Godbold v. Roberts*, 20 Ala. 354.

⁸ *Taylor v. Tatum*, 30 Miss. 701.

⁹ *Grier v. Huston*, 8 Serg. & R. 402; 11 Am. Dec. 627.

¹⁰ *Cravath v. Plympton*, 13 Mass. 454; *Thompson v. White*, 45 Me. 445; *Terhune v. Bray*, 16 N. J. L. 54; *Walter v. Miller*, 1 Harr. (Del.) 7; *Farrelly v. Ladd*, 10 Allen, 127; *Underwood v. Morgan*, 33 Conn. 105; *Clapp v. Walters*, 2

for fraud in his administration,¹ and a recovery may be had against him of the proceeds of a sale which has been disaffirmed.² So he may be compelled to pay a judgment debt due by his intestate.³

ILLUSTRATIONS. — Money was paid to an administrator by mistake, for which he receipted as administrator. *Held*, that an action to recover it might be brought against him personally: *Grier v. Huston*, 8 Serg. & R. 402; 11 Am. Dec. 627.

§ 963. **What Actions will not be Sustained against Executors and Administrators.** — They cannot ordinarily be sued in their representative capacity for goods furnished or services rendered to the estate after decedent's death; the remedy in such case is against them in their private capacity.⁴ Nor may they be sued in an action which existed by statute against the deceased and abated at his death.⁵ Nor does an action for breach of promise of marriage survive against the personal representative.⁶ So an action for a wrong done does not survive against such representatives.⁷ Nor is an executor liable personally on a judgment recovered against him in his representative capacity by a creditor of the estate, where such executor is also a residuary legatee and has given a bond to pay debts and legacies.⁸

§ 964. **Actions to Enforce Liability against the Estate.** — A transferee of a note belonging to the estate cannot maintain an action for the recovery of the amount due

Tex. 130; *Denny v. Booker*, 2 Bibb, 427. But see *Foster v. Brown*, 1 Bail. 221; 19 Am. Dec. 672; *Chaplin v. Barrett*, 12 Rich. 284; 75 Am. Dec. 731; and examine *Holmes v. Moore*, 5 Pick. 257; *Mellen v. Baldwin*, 4 Mass. 480; *Potts v. Smith*, 3 Rawle, 361; 24 Am. Dec. 359. It is also held that trover will lie against executors for a conversion by the testator: *Avery v. Moore's Ex'rs*, 1 Hayw. (N. C.) 362; 1 Am. Dec. 560.

¹ *Planters' Bank v. Neely*, 7 How. (Miss.) 80; 40 Am. Dec. 21.

² *Hudgin v. Hudgin*, 6 Gratt. 320; 52 Am. Dec. 124.

³ *Lenoir v. Winn*, 4 Desaus. 65; 6 Am. Dec. 597.

⁴ *Matthews v. Douthitt*, 27 Ala. 273; 62 Am. Dec. 765.

⁵ *Cowan v. Campbell*, 17 B. Mon. 522; 66 Am. Dec. 184.

⁶ *Stebbins v. Palmer*, 1 Pick. 71; 11 Am. Dec. 146.

⁷ *Osborn v. Bell*, 5 Denio, 370; 49 Am. Dec. 275.

⁸ *Jenkins v. Wood*, 144 Mass. 66.

thereon from the maker, when he has taken such note with full knowledge from the administrator, who had transferred it for his own private benefit.¹ But the estate may be held liable on a note of which the testator was an indorser, where notice of protest is legally fixed upon the estate,² and a suit may be maintained against the estate on a claim duly presented to and rejected by one only of several administrators.³ But where executors, being authorized by the testator so to do, carry on his business, only such property as is used for that purpose is *prima facie* liable for debts contracted therein.⁴

§ 965. Suits by and against Executors and Administrators in Foreign Jurisdictions. — An executor or administrator by the very force of his appointment obtains no authority or rights which extend beyond the limits of his own state for any purpose whatever. This principle, however, does not interfere with such rules of comity as the courts of other states may deem just, in the exercise of a sound legal discretion, to extend.⁵ So that it follows that an executor or administrator can neither sue, be sued, nor defend in his representative capacity, or by virtue of any rights conferred upon him by his office, in the courts of a state other than that in which appointed, unless he qualifies so to do under the laws of the latter state.⁶ But he may take out ancillary administration in

¹ *Prosser v. Leatherman*, 4 How. (Miss.) 237; 34 Am. Dec. 121; *Latham v. Moore*, 6 Jones Eq. 167; *Scott v. Searles*, 7 Smedes & M. 498; 45 Am. Dec. 317; *Smart v. Waterhouse*, 6 Humph. 158.

² *Goodman v. Warren*, 122 Mass. 79; 23 Am. Rep. 289.

³ *Dean v. Duffield*, 8 Tex. 235; 58 Am. Dec. 108.

⁴ *Wilson v. Friedensburg*, 21 Fla. 386.

⁵ This principle is fully considered in a note to *Alley v. Caspari*, 6 Am. St. Rep. 178.

⁶ *Doolittle v. Lewis*, 7 Johns. Ch.

45; 11 Am. Dec. 389; *Naylor v. Moffat*, 29 Mo. 126; *Gilman v. Gilman*, 54 Me. 453; *Swatzel v. Arnold*, Woolw. 383; *Leonard v. Putnam*, 51 N. H. 247; 12 Am. Rep. 106; *Goodwin v. Jones*, 3 Mass. 514; 3 Am. Dec. 173; *Dodge v. Wetmore*, Brayt. 92; *Petersen v. Chemical Bank*, 32 N. Y. 21; 88 Am. Dec. 298, and note 308; *Vaughan v. Northup*, 15 Pet. 1; *Brownson v. Wallace*, 4 Blatchf. 465; *Eels v. Holder*, 12 Fed. Rep. 668; note to *Deringer's Adm'r v. Deringer's Adm'r*, 1 Am. St. Rep. 160; *Perkins v. Williams*, 2 Root, 462; *Hobart v. Connecticut Turnpike Co.*, 15 Conn.

the foreign state, and may then sue or be sued therein.¹ Under the statutes, however, of some of the states such actions can be maintained without taking out ancillary letters;² and it is held that an administrator under the laws of one state can indorse a note so as to enable the indorsee to sue in another state, where there are in the latter state no claims against the estate of his intestate.³ So it is said that a suit may be brought in the foreign state on a judgment obtained by the administrator in the state where appointed.⁴ So an executor in Kentucky may authorize a legatee to sue in Mississippi.⁵ So where an administrator, appointed in Alabama, and sureties on his bond there given, became residents of Georgia, an action was held maintainable in the latter state for a breach of the bond.⁶ And it is held in New York that bringing property of the estate there makes the administrator liable in a suit in that state.⁷ So in the last-named state, it is

145; *Riley v. Riley*, 3 Day, 74; 3 Am. Dec. 260; *Glenn v. Smith*, 2 Gill & J. 493; 20 Am. Dec. 452; *Jackson v. Jackson*, 34 Ga. 511; *Sloan v. Sloan*, 21 Fla. 589; *McClure v. Bates*, 12 Iowa, 77; *Boyd v. Lambeth*, 24 Miss. 433; *Vickery v. Beir*, 16 Mich. 50; *Stacy v. Thrasher*, 6 How. 44; *Jones v. Jones*, 15 Tex. 463; 65 Am. Dec. 174; *Abbott v. Coburn*, 28 Vt. 663; 67 Am. Dec. 735; *McNamara v. Dwyer*, 7 Paige, 239; 32 Am. Dec. 627.

¹ *Noonan v. Bradley*, 9 Wall. 395; *Davis v. Smith*, 5 Ga. 274; 48 Am. Dec. 279; *Judy v. Kelly*, 11 Ill. 211; 50 Am. Dec. 455; *Lawrence v. Lawrence*, 3 Barb. Ch. 71; *Barrett v. Barrett*, 8 Me. 346; *Trotter v. White*, 10 Smedes & M. 607; *Mason v. Nutt*, 19 La. Ann. 41; *Willard v. Hammond*, 21 N. H. 382; *McCarty v. Hall*, 13 Mo. 480; *Smith v. Guild*, 34 Me. 443.

² *Matter of Galloway*, 21 Wend. 32; 34 Am. Dec. 209; *Newton v. Cocke*, 10 Ark. 169; *Sneed v. Ewing*, 5 J. J. Marsh. 460; 22 Am. Dec. 41. But such statutes do not direct the state courts of jurisdiction to grant such letters: *Broughton v. Bradley*, 34 Ala. 694; 73 Am. Dec. 474.

³ *Mackay v. St. Mary's Church*, 15 R. I. 121; 2 Am. St. Rep. 881.

⁴ *Page v. Cravens*, 3 Head, 383. See also *Hall v. Harrison*, 21 Mo. 227; 64 Am. Dec. 225. *Contra*, *Judy v. Kelley*, 11 Ill. 211; 50 Am. Dec. 455.

⁵ *Hamilton v. Cooper*, Walk. 542; 12 Am. Dec. 588. As *contra* to the general rule given in the text, see *Evans v. Tatem*, 9 Serg. & R. 252; 11 Am. Dec. 717; *Carr v. Wyley*, 23 Ala. 821; and see *Southwestern R. R. Co. v. Paulk*, 24 Ga. 356; *Wilkins v. Ellett*, 108 U. S. 256; *Dennick v. R. R. Co.*, 103 U. S. 11. As to the effect of a division of a state, see *Thomas v. White*, 3 Litt. 177; 14 Am. Dec. 56.

⁶ *Johnson v. Jackson*, 56 Ga. 326; 21 Am. Rep. 285. But they were held not liable where only temporarily in the jurisdiction: *Jackson v. Johnson*, 34 Ga. 511; 89 Am. Dec. 263.

⁷ *Gulick v. Gulick*, 33 Barb. 92. See also *Hedenburg v. Hedenburg*, 46 Conn. 30; 33 Am. Rep. 10; *Atchison v. Lindsey*, 6 B. Mon. 86; 43 Am. Dec. 153.

also held that a foreign administrator can sue in his own name where he is the real owner of the chose in action sued on.¹

§ 966. **Equity Jurisdiction.**—Equity extends its aid as well against as in favor of executors and administrators in cases where it has jurisdiction. Therefore, a purchaser of an equitable right from the distributees of a decedent whose estate is free from debts, and upon which no administration has been had, will be protected in equity against an administrator who afterwards takes out letters and seeks to recover in an action of trover.² But equity will not relieve a purchaser of land at a private sale which transfers no title, when there is no mistake or ignorance of any material fact, in the absence of fraud.³ Though relief may be had in chancery against fraudulent contracts made by the administrator with his co-administrator to the injury of the interests of the estate and in fraud of his trust.⁴ And courts of equity have concurrent jurisdiction with courts of law to aid creditors' suits against the personal representatives and heirs alike.⁵ So equity will aid in certain cases where an action cannot be maintained in a court of law by reason of the party's failure to comply with some statutory requirement requisite to bringing such action at law.⁶ But some special ground of equitable relief must be shown as a basis for the interposition of chancery in a suit against the personal representatives other than the mere fact that they are trustees of the estate.⁷ And equity will extend its aid and instruction to an administrator in the settlement of the estate only where there are such special circumstances

¹ *Petersen v. Chemical Bank*, 32 N. Y. 21; 88 Am. Dec. 298, and note 308.

² *Miles v. Wise*, 11 Rich. Eq. 536; 78 Am. Dec. 461.

³ *Haynes v. Meeks*, 10 Cal. 110; 70 Am. Dec. 703.

⁴ *Mosely v. Lane*, 27 Ala. 62; 62 Am. Dec. 752.

⁵ *Judah v. Brandon*, 5 Blackf. 506; *Martin v. Densford*, 3 Blackf. 295.

⁶ *Brewster v. Kendrick*, 17 Iowa, 479; *McCormack v. Cook*, 11 Iowa, 267; *Shomo v. Bissell*, 20 Iowa, 68; *Clifton v. Haig*, 4 Desaus. Ch. 330.

⁷ *Walker v. Cheever*, 35 N. H. 339.

involved as warrant such action.¹ A domiciliary administrator may maintain a bill in equity against the ancillary administrator for settlement where there is an excess of assets in the latter's hands.² So equity will entertain a bill against an executor to enforce the rights of legatees and next of kin where the executor's liability is based on his negligence.³ It will enjoin an action of ejectment by the administrator.⁴ But it will not take cognizance of a suit for the construction of a devise.⁵ Nor will it act as between co-executors unless absolutely imperative.⁶ Nor has the supreme court any jurisdiction as a court of chancery to settle an executor's account.⁷ Nor can equity intervene to correct a mistake in a petition for an administrator's sale whereby the sale of a wrong piece of land is made.⁸

§ 967. Pleadings and Practice in Actions and Proceedings Relative to Executors and Administrators.—A petition for letters of administration must allege the death of decedent, and that he was at the time of his death a resident of the county in which the letters are applied for, and these allegations must also be true in point of fact. If both these facts do not exist, the proceedings will be void.⁹

In a petition for an order of sale, an accurate and correct description of the realty of decedent is not required.¹⁰ The requirement, however, that a description of the real estate shall be set forth is jurisdictional, and if there is a default of such description, the sale is void.¹¹ But such

¹ Pitkin v. Pitkin, 7 Conn. 315; 18 Am. Dec. 111; McNeill v. McNeill, 36 Ala. 109; 76 Am. Dec. 320; Beers v. Strohecker, 21 Ga. 442.

² Hall v. Pegram, 85 Ala. 523.

³ Suydam v. Bastedo, 40 N. J. Eq. 433.

⁴ Murdock v. Mitchell, 30 Ga. 74; 76 Am. Dec. 634. See Carter v. Greenwood, 5 Jones Eq. 410.

⁵ Woodlief v. Merritt, 96 N. C. 226.

⁶ Rogers v. Moor, 1 Root, 472;

Stiver v. Stiver, 8 Ohio, 217; Wurts v. Jenkins, 11 Barb. 546.

⁷ Jennison v. Hapgood, 7 Pick. 1; 19 Am. Dec. 258.

⁸ Ward v. Brewer, 19 Ill. 291; 68 Am. Dec. 596.

⁹ Beckett v. Selover, 7 Cal. 215; 68 Am. Dec. 237.

¹⁰ Stuart v. Allen, 16 Cal. 473; 76 Am. Dec. 551.

¹¹ Townsend v. Gordon, 19 Cal. 188.

sale is not rendered void because the petition therefor fails to state the value of the personal property, or to set forth a specific account of the debts due from the decedent, since it is within the jurisdiction of the court to decide on the sufficiency of the petition.¹ The same rules of pleading govern actions brought by foreign or domestic administrators.²

An executor must declare in his representative capacity when he sues in respect to a cause of action which accrued in the lifetime of his testator.³ But he may sue in his own name and right on a contract made with him; and if the word "executor" is used after his name, it will be regarded as immaterial;⁴ and the same rule as to the addition of the word being surplusage applies to an action against an administrator on which he is personally liable.⁵ But where the action is brought by the executor or administrator as such, it is held that there should be an averment of the character in which he sues, and that the complaint or bill ought to show this fact on its face.⁶ If the defendants, however, are described as administrators, this cannot be considered as surplusage such as to warrant a recovery against one of them alone;⁷ though where the suit is on a note for purchase-money for property sold belonging to the estate, the executor may declare in his own name, and need not aver his representative capacity.⁸

¹ *Morrow v. Weed*, 4 Iowa, 77; 66 Am. Dec. 122. See *Stuart v. Allen*, 16 Cal. 473; 76 Am. Dec. 551; *Elrod v. Lancaster*, 2 Head, 571; 75 Am. Dec. 749.

² *Collins v. Ayers*, 13 Ill. 358.

³ *Lawson v. Lawson*, 16 Gratt. 230; 80 Am. Dec. 702.

⁴ *Wolf v. Beaird*, 123 Ill. 585; 5 Am. St. Rep. 565. See *Keniston v. Little*, 30 N. H. 318; 64 Am. Dec. 297.

⁵ *King v. Beeler*, 7 Bibb, 83; *Merritt v. Seaman*, 6 N. Y. 168; *Peters v. Heydenfe't*, 3 Ala. 206; *Hood v. Link*, 2 B. Mon. 37. See *Litchfield v. Flint*, 104 N. Y. 543.

⁶ *Pelletreau v. Rathbone*, 1 N. J. Eq. 331; *Sabin v. Hamilton*, 2 Ark. 485; *Ipelheimer v. Chapman*, 32 Ala. 676; *Shearman v. Christian*, 6 Rand. 49; *Williams v. Moore*, 32 Ala. 536.

⁷ *Yarrington v. Robinson*, 141 Mass. 450.

⁸ *Evans v. Gordon*, 8 Port. 346; *Gunn v. Hodge*, 32 Miss. 319; *Oglesby v. Gilmore*, 5 Ga. 56; *Goodman v. Walker*, 30 Ala. 482; 68 Am. Dec. 134. See *Brown v. Nourse*, 55 Me. 230; 92 Am. Dec. 583; *Sims v. Boynton*, 32 Ala. 353; 70 Am. Dec. 540; *Wyatt's Adm'r v. Rambo*, 29 Ala. 510; 68 Am. Dec. 89.

An executor may not aver illegal acts of his own in action of creditors against him,¹ and where he is sued for decedent's debt, he must plead so as to protect all creditors of whose claims he has notice.² But he is not bound to plead the limitation act in all cases, especially not where he believes the claim to be just.³ If an action is brought by an administrator *de bonis non* to set aside a mortgage of the intestate, a deficiency of assets is necessary to be averred.⁴

In actions by an executor or administrator, counts may be joined of promises to himself and promises to his testator whenever the money recovered would be assets;⁵ but where a cause of action was incepted after the testator's death, it cannot be joined with one arising before that time.⁶ So in actions against an executor or administrator, a distinction exists between actions in their own rights and in their representative capacity, and care should be taken not to join counts against them in their separate capacities.⁷

§ 968. **Limitation Acts.** — It is held that the promise of an executor is no bar to the act of limitations.⁸ The

¹ Collins v. Hollier, 13 La. Ann. 585.

² Davis v. Smith, 5 Ga. 274; 48 Am. Dec. 279.

³ Trimble v. Marshall, 66 Iowa, 233; Pollard v. Scaers, 28 Ala. 484; 65 Am. Dec. 364; Barnawell v. Smith, 5 Jones Eq. 168; Chambers v. Fennemore, 4 Harr. (Del.) 368; Semmes v. Magruder, 10 Md. 242; Batson v. Murrell, 10 Humph. 301; 51 Am. Dec. 707; Tunstall v. Pollard, 11 Leigh, 1.

⁴ Kellogg v. Beeson, 58 Mich. 340.

⁵ Sullivan v. Holker, 15 Mass. 374; Fry v. Evans, 8 Wend. 530. See Stevens v. Gregg, 10 Serg. & R. 234; Clarke v. Lamb, 6 Pick. 512; Munch v. Williamson, 24 Cal. 167.

⁶ Myer v. Cole, 12 Johns. 349; Gillett v. Hutchinson, 24 Wend. 184; Dermott v. Field, 7 Cow. 58.

⁷ Mason v. Norcross, 1 N. J. L. 242; Malin v. Bull, 13 Serg. & R. 441; Reeve v. Cawley, 17 N. J. L. 415; Epes v.

Dudley, 5 Rand. 437; Godbold v. Roberts, 20 Ala. 354; Carter v. Phelps, 8 Johns. 440; Grahame v. Harris, 5 Gill & J. 489; McDaniel v. Parks, 19 Ark. 671; Vaughn v. Gardner, 7 B. Mon. 326; Seip v. Drach, 14 Pa. St. 352; Bank v. Cullen, 4 Harr. (Del.) 289; Gregory v. Hooker, 1 Hawks, 394; 9 Am. Dec. 646; Robbins v. Gillett, 2 Chand. 96; Frink v. Taylor, 16 N. J. L. 196; Pugsley v. Aikin, 14 Barb. 114; Bogle v. Kreitzer, 46 Pa. St. 465. See Flowers v. Kent, Brayt. 134.

⁸ Fisher v. Duncan, 1 Hen. & M. 563; 3 Am. Dec. 605; Seig v. Acord's Ex'r, 21 Gratt. 365; 8 Am. Rep. 605; Moore v. Hillebrant, 14 Tex. 312; 65 Am. Dec. 118; Probate Judge v. Ellis, 63 N. H. 366; Bingham v. Robertson, 25 Miss. 501. But see Shreve v. Joyce, 36 N. J. L. 44; 13 Am. Rep. 417, as to promise by one of several administrators. See also Head v. Manners, 5 J.

statute of limitations does not run in favor of an administrator against distributees and legatees so as to bar their claims.¹ In a suit in equity to recover money paid by the administrator, in ignorance of material facts, to a distributee in excess of the sum to which he was entitled, the bar of the statute cannot be avoided on the ground of mistake until the statutory limitation for the commencement of the action had expired, where it sufficiently appears that other facts sufficient to have put him on inquiry existed;² but the debts of the estate may be presumed, after a long lapse of time, to have been satisfied.³

§ 969. **Statute of Frauds.**—An administrator is precluded under the statute of frauds from making any verbal promise to pay his intestate's debts in the absence of assets.⁴

ILLUSTRATIONS.—An administrator having brought a suit in his representative capacity, the parties orally agreed to submit the subject to arbitration, and that if the award proved satisfactory, each should pay one half the costs, but if unsatisfactory, the party refusing to accept should pay all the costs. The arbitration was executed, but the administrator refused to accept the award, and prosecuted the action to judgment. The defendant paid the costs, and sued the administrator individually for repayment. *Held*, that the action was maintainable: *Holderbaugh v. Turpin*, 75 Ind. 84; 39 Am. Rep. 124.

J. Marsh. 255; *Hord v. Lee*, 2 B. Mon. 131; *Lomax v. Spierin*, Dudley, 365; and examine *McCann v. Sloan*, 25 Md. 575. Where such acknowledgment is approved by the court, it operates as a bar: *Howard v. Battle*, 18 Tex. 673; and see, generally, note to *Briggs v. Starke*, 12 Am. Dec. 659; *Steele v. Steele's Adm'r*, 64 Ala. 438; 38 Am. Rep. 15.

¹ *Lafferty v. Turley*, 3 Sneed, 157; *Picot v. Bates*, 39 Mo. 292; *Knight v. Browner*, 14 Md. 1; *Wren v. Gayden*, 2 Miss. 365; *Amos v. Campbell*, 9 Fla. 187; *Bailey v. Shannonhouse*, 1 Dev. Eq. 416.

² *Shriver v. Garrison*, 30 W. Va. 456, 475.

³ *Rosenthal v. Renick*, 44 Ill. 202; *Coleman v. Lane*, 26 Ga. 515; *Buie v. Buie*, 2 Ired. L. 87; *Donaldson v. Rabor*, 28 Md. 34. As to action on bond, see *Philips v. State*, 5 Ohio St. 122; 64 Am. Dec. 635. And the rule which applies to bonds in this respect applies to citation proceedings: *Id.*

⁴ *Sidle v. Anderson*, 45 Pa. St. 464; *Ciples v. Alexander*, 2 Tread. Const. 767. See also *Hester v. Wesson*, 6 Ala. 415; *Shepherd v. Young*, 8 Gray, 152; 69 Am. Dec. 242.

§ 970. **Judgments—Cases of Executors and Administrators.**—Where an action is prosecuted to judgment in cases against executors and administrators, the judgment should be against them to be executed against the goods of the deceased, and not against them generally;¹ and judgment should not be given against an administrator *de bonis propriis*;² and it is necessary, in order that a judgment may be rendered against one in his representative capacity, that he should be made a party to the suit.³ In California, an administrator cannot be subjected to a judgment *in personam* upon the sole ground that the estate of the deceased is indebted to the plaintiff.⁴

§ 971. **Sureties on Official Bond.**—The sureties on an official bond of an administrator may be subjected to a judgment without first taking accounts, where the settlement of the administrator's account shows assets sufficient to pay all the intestate's debts;⁵ and such surety is concluded by the final settlement in the probate court.⁶

§ 972. **Legal Effect of Judgments, and What They Import.**—A necessity for a sale is evidenced by the fact that an order of sale of the probate court is made.⁷ So, in a collateral proceeding, a judgment against an administrator is conclusive evidence of indebtedness.⁸ So a decree of a probate court directing an administrator to pay over a sum found due is conclusive upon the admin-

¹ *Flagg v. Winans*, 2 Ind. 123; *Quick-sall v. Quick-sall*, 3 N. J. L. 457; *Campfield v. Ely*, 13 N. J. L. 150; *Barrow v. Wado*, 7 Smedes & M. 49; *Massingale v. Jones*, 3 Hayw. (Tenn.) 30.

² *Pope v. Robinson*, 1 Stew. 415; *Armstrong v. Johnson*, Minor, 169; *Hill v. Robeson*, 2 Smedes & M. 541; *Laughlin v. McDonald*, 1 Mo. 684.

³ *Uary v. Suit*, 91 N. C. 406.

⁴ *Myers v. Mott*, 29 Cal. 359; 89 Am. Dec. 49.

⁵ *Morrison v. Lavell*, 81 Va. 519.

⁶ *Ragland v. Calhoun*, 36 Ala. 606; *Heard v. Lodge*, 20 Pick. 53; 32 Am. Dec. 202; *Jones v. Jones*, 8 Humph. 705; *Stevens v. Matthews*, 6 Vt. 269; *Watts v. Gayle*, 20 Ala. 817. *Contra*, *Todd v. Lewis*, 2 Handy, 280; and see note to *Heard v. Lodge*, 32 Am. Dec. 202.

⁷ *McDade v. Burch*, 7 Ga. 559; 50 Am. Dec. 407.

⁸ *Faran v. Robinson*, 17 Ohio St. 242; 93 Am. Dec. 617.

istrator and his sureties;¹ and a final decree adjusting and closing an administrator's account has the elements of final judgment, but orders and decrees preparatory to such settlement do not have that effect, but are subject to change and modification.² So an allowance by the probate court of one state of the claim of an ancillary administrator there, who was resident of another state, which allowance was greater than the assets in his hands, is not conclusive upon the heirs in such foreign state.³ But a statement of an annual account is not conclusive.⁴ An order of sale, however, is conclusive until vacated;⁵ but a lost probate decree is not deemed valid unless it is shown that process was served;⁶ and a judgment against an administrator is conclusive against him upon the question of personal assets in his hands and their sufficiency.⁷ But a judgment against an executor is held not to be binding upon a succeeding administrator *de bonis non*,⁸ though a claim which is properly admitted and allowed by the probate court has the force of a judgment;⁹ and a decree of appointment of an administrator is conclusive.¹⁰ So an order of court confirming a sale is conclusive.¹¹

¹ *Irwin v. Backus*, 25 Cal. 214; 85 Am. Dec. 125.

² *Austin v. Lamar*, 23 Miss. 189; *Standard v. Locks*, 25 Mo. App. 64; *Mix's Appeal*, 35 Conn. 121; 95 Am. Dec. 222; *Stubblefield v. McRaven*, 5 Smedes & M. 130; 43 Am. Dec. 502; *Caldwell v. Lockridge*, 9 Mo. 362; *State v. Roland*, 23 Mo. 95; *Barton v. Barton*, 35 Mo. 158. But see *Beatty v. State*, 7 Cranch, 281; *Lucich v. Meadin*, 3 Nev. 93; 93 Am. Dec. 376; and compare *Smith v. Hurd*, 8 Miss. 188; *Searles v. Scott*, 14 Smedes & M. 94; *Strong v. Wilkson*, 14 Mo. 116. Though the allowance of such claim may not bind a creditor who is not a party: *Estate of Hidden*, 23 Cal. 362.

³ *Ela v. Edwards*, 13 Allen, 48; 90 Am. Dec. 174.

⁴ *Picot v. Biddle*, 35 Mo. 29; 86 Am. Dec. 134, and note 143; *Walls v. Walker*, 37 Cal. 424; 99 Am. Dec. 290. As to account improperly filed

and allowed, see *Matthews v. Douthitt*, 27 Ala. 273; 62 Am. Dec. 765. As to partial account finally confirmed, see *Shindel's Appeal*, 57 Pa. St. 43.

⁵ *Field's Heirs v. Goldsby*, 28 Ala. 218; 65 Am. Dec. 341; *McDade v. Burch*, 7 Ga. 559; 50 Am. Dec. 407.

⁶ *Martin v. Williams*, 42 Miss. 210; 97 Am. Dec. 456.

⁷ *Post v. Mackall*, 3 Bland, 486; *Dorsey v. Hammond*, 1 Bland, 463.

⁸ *Graves v. Flowers*, 51 Ala. 402; 23 Am. Rep. 555.

⁹ *Tate v. Norton*, 94 U. S. 746; *Cossett v. Biscoe*, 12 Ark. 95. See *McMofrin v. Overholt*, 14 Ark. 244; *Moore v. Hillebrant*, 14 Tex. 312; 65 Am. Dec. 118; *Kennerly v. Shepley*, 15 Mo. 640; 57 Am. Dec. 219.

¹⁰ *Clark v. Postion*, 31 Me. 503; *Palmer v. Oakley*, 2 Doug. (Mich.) 433; 47 Am. Dec. 41.

¹¹ *Bland v. Muncaster*, 24 Miss. 62; 57 Am. Dec. 162.

§ 973. **Judgments—Impeaching Collaterally.**—A judgment based upon valid proceeding, and legally rendered, and in its nature final, cannot be collaterally impeached; and this rule applies to appointments;¹ to orders of sale of real estate;² to a purchaser's title acquired under such sale,³ especially where the land is afterwards sold to *bona fide* purchasers for value;⁴ to record evidence of final settlements;⁵ to actions of court in removals and substitution of executors and administrators;⁶ and it is also said that an administrator's report cannot be impeached collaterally after a great lapse of time on matters of mere formality.⁷

§ 974. **Executor of Executor.**—The common-law rule, by virtue of which an executor's executor might administer on the estate of the original testator, although existing in some of the states,⁸ is negatived by statute in a large number of others.⁹

¹ Rump v. McDaniel, 12 Or. 108; San Francisco v. R. R. Co., 35 Fed. Rep. 647; Barclay v. Kimsey, 72 Ga. 725; Riser v. Snoddy, 7 Ind. 442; 65 Am. Dec. 740; Driggs v. Abbott, 27 Vt. 580; 65 Am. Dec. 214; Abbott v. Coburn, 28 Vt. 663; 67 Am. Dec. 735; Succession of Harris, 39 La. Ann. 443; 4 Am. St. Rep. 269; Irwin v. Scriber, 18 Cal. 499; Wight v. Wallbaum, 39 Ill. 554; Boody v. Emerson, 17 N. H. 577; Abbott v. Coburn, 28 Vt. 663; 67 Am. Dec. 735; Sadler v. Sadler, 16 Ark. 628; Emery v. Hildreth, 2 Gray, 228; Naylor v. Moffatt, 29 Mo. 126. See Giddings v. Steele, 28 Tex. 733; 91 Am. Dec. 336; Andrews v. Avory, 14 Gratt. 229; 73 Am. Dec. 355.

² Iverson v. Loberg, 26 Ill. 179; 79 Am. Dec. 364; Saltonstall v. Riley, 28 Ala. 164; 65 Am. Dec. 334; Boyd v. Blankman, 29 Cal. 19; 87 Am. Dec. 146; Camden v. Plain, 91 Mo. 117. But *contra*, void administrator's sale, even though confirmed: Townsend v. Tallant, 35 Cal. 45; 91 Am. Dec. 617.

³ Seymour v. Ricketta, 21 Neb. 240.

⁴ Martin v. Robinson, 67 Tex. 368.

⁵ Dooley v. Dooley, 14 Ark. 122. See Pacher v. Bussell, 11 Cush. 107; Debrell v. Ponton, 27 Tex. 623.

⁶ Buehler v. Buffington, 43 Pa. St. 278.

⁷ Stevenson v. McReary, 12 Smedes & M. 9; 51 Am. Dec. 102.

⁸ Windsor v. Bell, 61 Ga. 671; Hart v. Smith, 20 Fla. 58; Roanoke Nav. Co. v. Green, 3 Dev. 434; Dean v. Dean, 7 B. Mon. 304. See Lay v. Lay, 10 S. C. 208; Carrol v. Connet, 2 J. J. Marsh. 195; In re Drayton, 4 McCord, 46; Dawson v. Callaway, 18 Ga. 573; Arline v. Miller, 22 Ga. 330.

⁹ See statutes in Alabama, Arkansas, and other states, enumerated in 2 Woerner on American Law of Administration, sec. 350, p. 742. "In those states in which the common-law rule in this respect still prevails, it seems that the executor of the executor takes the incompleated administration of the original testator's estate by operation of law, although the deceased executor made no provision to that effect in his own will. Thus if such executor prove the will of his immediate testator generally without renouncing the executorship of the original testator, he becomes the executor of the original testator, but he may so renounce and yet qualify as executor of his immediate testator":

§ 975. **Co-executors and Administrators — Rights and Powers.** — Generally the acts of one co-executor are held to be the acts of all,¹ and this rule applies to personal estate of the deceased,² and extends to the delivering, gift, sale, or release of the goods of the estate,³ and also applies to receiving, holding, or disbursing the assets,⁴ and permits the submission to arbitration of an amicable action,⁵ so a co-executor may apply for the discharge of his co-executor,⁶ but the rule does not give the right to a co-executor to contract for the purchase of property.⁷

ILLUSTRATIONS. — Co-executors deposited money belonging to the estate in bank to their joint account as executors, and the bankers failed and assigned their property for the benefit of creditors. *Held*, that one of the executors could not release the claim of estate against the bankers by signing with other creditors an agreement to look solely to the funds in the hands of the assignee: *De Haven v. Williams*, 80 Pa. St. 480; 21 Am. Rep. 107. A note was executed to two administrators. *Held*, that it could not be assigned by one of them: *Sanders v. Blain's Adm'rs*, 6 J. J. Marsh. 446; 22 Am. Dec. 86.

§ 976. **Powers to Sell under Will.** — A power to executors to sell cannot be executed by one alone,⁸ unless some of the executors refuse to qualify; in which case those who qualify possess full power to sell under the will, because the power attaches to the office rather than to the person.⁹

Id. See *Worth v. McAden*, 1 Dev. & B. Eq. 199. Payment to an administrator of a deceased administrator is invalid: *Stair v. York Nat. Bank*, 55 Pa. St. 364; 93 Am. Dec. 759.

¹ *Gilman v. Healy*, 55 Me. 120; *Wilkinson v. Wooten*, 28 Ga. 568; *Dean v. Duffield*, 8 Tex. 235; 58 Am. Dec. 108; *Herald v. Harper*, 8 Blackf. 170.

² *Bodley v. McKinney*, 9 Smedes & M. 339.

³ *Shaw v. Berry*, 35 Me. 279; 58 Am. Dec. 702; *Devling v. Little*, 26 Pa. St. 502; *Hoke v. Fleming*, 10 Ired. 263; *Gleason v. Lillie*, 1 Aik. 28; *Stuyvesant v. Hall*, 2 Barb. Ch. 151.

⁴ *Beall v. Hilliary*, 1 Md. 186; 54 Am. Dec. 649.

⁵ *Lank v. Kinder*, 4 Harr. (Del.) 457.

⁶ *Hesson v. Hesson*, 14 Md. 8.

⁷ *Scruggs v. Driver*, 13 Ala. 274.

⁸ *Floyd v. Johnson*, 2 Litt. 109; 13 Am. Dec. 255; *Brown v. Hobson*, 3 A. K. Marsh. 380; 13 Am. Dec. 187; *Smith v. Moore*, 6 Dana, 417; *Halbert v. Grant*, 4 B. Mon. 580; *McRae v. Farrow*, 4 Hen. & M. 444; *King v. Hummer*, 2 Pa. St. 349; *Port Gibson v. Baugh*, 9 Smedes & M. 290. But see *Childress v. Bennett*, 10 Ala. 751; 44 Am. Dec. 503.

⁹ *Taylor v. Galloway*, 1 Ohio, 232; 13 Am. Dec. 605; *Miller v. White*, Tayl. 309; 50 Am. Dec. 591; *Britton v. Lewis*, 8 Rich. Eq. 271; *Leavens v. Butler*, 8 Port. 380; *Leggett*

§ 977. **Co-executors' Liability for the Acts of Each Other.**—Co-executors are not sureties for each other, and in the absence of such knowledge of, or assent to, or concurrence or connivance with, the wrongful act, or in the absence of gross negligence, one executor is not to be held liable for the *devastavit* of his co-executor, or for his misapplication of assets, or for other separate acts of the other.¹

§ 978. **Foreign Executors and Administrators.**—A grant of letters has no force, except by the rules of comity, beyond the state in which made,² though the deceased was domiciled in another state.³

§ 979. **Rights and Powers of.**—Administrators may contract to purchase property of estate not in their control,⁴ though they are not chargeable with assets in another state.⁵ An administrator cannot assign a mortgage

v. Hunter, 19 N. Y. 445; *White v. Taylor*, 1 Yeates, 422; *Corlies v. Little*, 14 N. J. L. 373; *Zebach v. Smith*, 3 Binn. 69; 5 Am. Dec. 352; *Johnston v. Thompson*, 5 Call, 248.

¹ *State v. Belin*, 5 Harr. (Del.) 400; *Sutherland v. Brush*, 7 Johns. Ch. 17; 11 Am. Dec. 383; *Davis v. Walford*, 2 Ind. 88; *Johnson v. Johnson*, 2 Hill Ch. 277; 29 Am. Dec. 72; *Peter v. Beverly*, 10 Pet. 532; *Ray v. Doughty*, 4 Blackf. 115; *Lenoir v. Winn*, 4 Desaus. Eq. 65; 6 Am. Dec. 597; *English v. Newell*, 42 N. J. Eq. 76; *Fennimore v. Fennimore*, 3 N. J. Eq. 292; *Roach v. Hubbard*, 6 Litt. 235; *Hall v. Carter*, 8 Ga. 388; *Gaultney v. Nolan*, 33 Miss. 559; *Banks v. Wilkes*, 3 Sand. Ch. 99; *Cameron v. Justices*, 1 Ga. 36; 44 Am. Dec. 636; *Beall v. Hilliary*, 1 Md. 186; 54 Am. Dec. 649; *Worth v. McAden*, 1 Dev. & B. Eq. 199; *Kerr v. Kirkpatrick*, 8 Ired. Eq. 137; *Clarke v. Jenkins*, 3 Rich. Eq. 318; *Gates v. Whetstone*, 8 S. C. 244; 28 Am. Rep. 284; *Succession of Jordy*, 5 La. Ann. 37; *Atcheson v. Robertson*, 3 Rich. Eq. 132; 55 Am. Dec. 634. See note to *Jones's Ap-*

peal, 42 Am. Dec. 288. *Examine Clark v. Clark*, 8 Paige, 152; 35 Am. Dec. 676; *Edmonds v. Crenshaw*, 14 Pet. 166; *Noland v. Calvit*, 12 Smedes & M. 273; *Clarke v. Cotton*, 2 Dev. Eq. 51; 24 Am. Dec. 279; *Foute v. Horton*, 36 Miss. 350; *Estate of Sanderson*, 7 Cal. 199. *Contra*, *Brotten v. Bateman*, 2 Dev. Eq. 115; 22 Am. Dec. 732; *Clarke v. State*, 6 Gill & J. 288; 26 Am. Dec. 576; *Pearson v. Darrington*, 32 Ala. 227 (joint bond); *Wilmerding v. McKesson*, 103 N. Y. 329.

² *Fletcher v. Sanders*, 7 Dana, 345; 32 Am. Dec. 96; *Salmond v. Price*, 13 Ohio, 368; 42 Am. Dec. 204; *Schneller v. Vance*, 8 La. 506; 28 Am. Dec. 140; *Burbank v. Payne*, 17 La. Ann. 15; 87 Am. Dec. 513. But see *Deringer's Adm'r v. Deringer's Adm'r*, 5 Houst. 416; 1 Am. St. Rep. 150.

³ *Packwood's Succession*, 12 Rob. (La.) 334; 43 Am. Dec. 230.

⁴ *Sheldon v. Estate of Rice*, 30 Mich. 296; 18 Am. Rep. 136.

⁵ *Mothland v. Wireman*, 3 Pen. & W. 185; 23 Am. Dec. 71.

of land situate in a foreign state;¹ nor redeem such mortgage;² nor lease lands of the testator in another state;³ nor receive rents of lands outside the state;⁴ nor convey lands in another state, except, perhaps, by virtue of a power given in the will;⁵ nor sell lands in another state;⁶ nor release a debtor in another state so as to bar an action by the local administrator;⁷ nor, in Georgia, may a foreign administrator maintain a suit without filing a copy of his letters of administration.⁸

§ 980. Payments to.—It is held in Delaware that payments to a foreign administrator are good, although such administrator has neither given security nor recorded his letters.⁹ So they are held effectual in New York on principles of national comity.¹⁰

§ 981. Account and Settlement.—All questions of accountability of an executor or administrator relative to the discharge of his duties, as well as the right to call him to account and settlement generally, must be decided by and exists only in the state where appointed.¹¹

§ 982. Ancillary Administration.—Ancillary or auxiliary administration is that which is granted in pursu-

¹ *Cutter v. Davenport*, 1 Pick. 81; 11 Am. Dec. 149.

² *Haven v. Foster*, 9 Pick. 112; 19 Am. Dec. 353.

³ *Rutherford v. Clark*, 4 Bush, 27.

⁴ *Smith v. Wiley*, 22 Ala. 396; 58 Am. Dec. 262.

⁵ *Newton v. Bronson*, 13 N. Y. 587; 67 Am. Dec. 89.

⁶ *Salmond v. Price*, 13 Ohio, 368; 42 Am. Dec. 204.

⁷ *Vaughn v. Barret*, 5 Vt. 333; 26 Am. Dec. 306.

⁸ *Mansfield v. Turpin*, 32 Ga. 260. See further, on rights of foreign executors and administrators, note to *Doolittle v. Lewis*, 11 Am. Dec. 394.

⁹ *Deringer's Adm'r v. Deringer's Adm'r*, 5 Houst. 416; 1 Am. St. Rep. 150.

¹⁰ *Petersen v. Chemical Bank*, 32 N. Y. 21; 86 Am. Dec. 298.

¹¹ *Cocks v. Varney*, 42 N. J. Eq. 514; *Kennedy v. Kennedy*, 8 Ala. 391; *Hooper v. Olmstead*, 6 Pick. 582; *Heydock's Appeal*, 7 N. H. 496; *Fay v. Haven*, 3 Met. 109; *McGehee v. Polk*, 24 Ga. 406; *Lawrence v. Elmendorf*, 5 Barb. 73; *Marrion v. Titsworth*, 18 B. Mon. 582; *Beeler v. Dunn*, 3 Head, 87; 75 Am. Dec. 761. Where he comes within the jurisdiction, and brings funds and property of the estate, he may be called to account therefor: *Id.* See also the following cases, where the administrator was ordered to account: *Ray v. Simmons*, 11 R. I. 266; 23 Am. Rep. 447; *Cureton v. Mills*, 13 S. C. 409; 36 Am. Rep. 700; *Powell v. Stratton*, 11 Gratt. 792; *Montalvan v. Clover*, 32 Barb. 190.

ance of the laws of a government other than that of the decedent's domicile.¹ So that if the personal representative desires to obtain property which is abroad, he should obtain an ancillary appointment.² But the domiciliary administrator is entitled to any residuum of the assets, and to him they should be transmitted.³

§ 983. **Executors de Son Tort—Who are Such Executors.**—Any intermeddling with the estate of a deceased person, or any act which evinces control over the property without legal right being shown, makes the party so acting an executor *de son tort*;⁴ and this rule applies to the heir,⁵ to the widow,⁶ to a donee under a fraudulent deed void as to creditors,⁷ to a vendee under a fraudulent sale to a fraudulent donee,⁸ and to an administrator of a fraudulent assignee.⁹

ILLUSTRATIONS.—A widow took possession of and used a horse belonging to her deceased husband, and negligently permitted the same to be lost. *Held*, that she constituted herself his executrix *de son tort*: *Hubble v. Fogartie*, 3 Rich. 413; 45 Am. Dec. 775. A son was the transferee of property of his de-

¹ *Goodall v. Marshall*, 11 N. H. 88; 35 Am. Dec. 472; *Stevens v. Gaylord*, 11 Mass. 256; *Childress v. Bennett*, 10 Ala. 751; 44 Am. Dec. 503; *Fay v. Haven*, 3 Met. 109, 114; *Dawes v. Boylston*, 9 Mass. 337; 6 Am. Dec. 72; *Perkins v. Stone*, 18 Conn. 270; *Spradling v. Pipkin*, 15 Mo. 118; *Adams v. Adams*, 11 B. Mon. 77; *Clark v. Clement*, 33 N. H. 563; *Green v. Rugely*, 23 Tex. 539.

² *Upton v. Hubbard*, 28 Conn. 274; 73 Am. Dec. 670.

³ *Fletcher v. Sanders*, 7 Dana, 345; 32 Am. Dec. 96.

⁴ *Emery v. Berry*, 28 N. H. 473; 61 Am. Dec. 622; *Bacon v. Parker*, 12 Conn. 213; *Bennet v. Ives*, 30 Conn. 329; *Wiley v. Truett*, 12 Ga. 588; *Glenn v. Smith*, 2 Gill & J. 493; 20 Am. Dec. 452; *Bailey v. Miller*, 5 Ired. 444; 44 Am. Dec. 47; *Johnston v. Duncan*, 3 Litt. 163; 14 Am. Dec. 54; *Givens v. Higgins*, 4 McCord, 286; 17 Am. Dec. 742; *Barron v. Burney*, 38 Ga.

264; *White v. Mann*, 26 Me. 361; *Leach v. Pillsbury*, 15 N. H. 137; *Brown v. Durbin*, 5 J. J. Marsh. 170; *Howell v. Smith*, 2 McCord, 516.

⁵ *Ansley v. Baker*, 14 Tex. 607; 65 Am. Dec. 136.

⁶ *Hubble v. Fogartie*, 3 Rich. 413; 45 Am. Dec. 775.

⁷ *Tucker v. Williams*, Dud. (S. C.) 329; 31 Am. Dec. 561.

⁸ *Babcock v. Booth*, 2 Hill, 181; 38 Am. Dec. 578; *Hopkins v. Towns*, 4 B. Mon. 124; 39 Am. Dec. 497; *Allen v. Kimball*, 15 Me. 116; *Simonton v. McLane*, 25 Ala. 353; *Bailey v. Miller*, 5 Ired. 444; 44 Am. Dec. 47; *Norfleet v. Riddick*, 3 Dev. 221; 22 Am. Dec. 711.

⁹ *Morine v. Stoney*, 4 Dev. & B. 198; 34 Am. Dec. 374. See further, on the general question of rights and liabilities, etc., of an executor *de son tort*, note to *Brown v. Sullivan*, 85 Am. Dec. 423; note to *Turner v. Childs*, 17 Am. Dec. 561.

ceased father under a fraudulent conveyance, and subsequent to his father's death, converted other property of the estate. *Held*, that he was an executor *de son tort*: *Ellis v. McGee*, 63 Miss. 168.

§ 984. **Who are not Such Executors.**—The taking possession of goods of the deceased does not make one an executor *de son tort* when such possession is founded on a claim or color of title;¹ nor does one become such executor by doing mere acts of kindness and charity, such as taking care of the property, feeding stock, providing for children, and the like;² nor does the exercise of acts of necessity and humanity, without intent to assume control of the property, make one an executor in his own wrong;³ nor does the locking up goods for safe-keeping so operate;⁴ nor the acting as servant to another;⁵ nor paying the debts of deceased with one's own money.⁶

ILLUSTRATIONS.—The intestate had departed from the state on a trading voyage, and had died abroad, leaving his wife with a family to support, and she used the property for such support and the payment of debts. *Held*, that she was not an executrix in her own wrong: *Brown v. Benight*, 3 Blackf. 39; 23 Am. Dec. 373. An agent, after his principal's death, collected debts due on a sale made by him during the principal's lifetime. *Held*, not to be an executor *de son tort*: *Turner v. Child*, Dev. 25; 17 Am. Dec. 555. A widow who continues to reside where the family lived at the time of her husband's decease, and takes care of the property until the appointment of an executor, does not thereby become an executrix in her own wrong: *Ward v. Bevell*, 10 Ala. 197; 44 Am. Dec. 478.

§ 985. **Subsequent Appointment of, Validates Acts.**—An executor *de son tort* may, it seems, discharge himself from liability by taking out letters of administration.⁷

¹ *Claussen v. Lafrenz*, 4 G. Greene, 224; *Densler v. Edwards*, 5 Ala. 31; *Ward v. Bevell*, 10 Ala. 197; 44 Am. Dec. 478; *Smith v. Porter*, 35 Me. 287; *Turner v. Child*, Dev. 25; 17 Am. Dec. 555.

² *Brown v. Sullivan*, 22 Ind. 359; 85 Am. Dec. 421.

³ *Emery v. Berry*, 28 N. H. 473; 61 Am. Dec. 622.

⁴ *Glenn v. Smith*, 2 Gill & J. 493; 20 Am. Dec. 452.

⁵ *Givens v. Higgins*, 4 McCord, 286; 17 Am. Dec. 742.

⁶ *Carter v. Robbins*, 8 Rich. 29.

⁷ *Emery v. Berry*, 28 N. H. 473; 61

§ 986. **Administrators de Bonis non.** — A grant of administration to administrator *de bonis non* confers upon him the choses in action, goods and chattels, rights and credits, of his intestate which were unadministered.¹ The administration *de bonis non* must be granted in the courts of the county in which administration was first granted.² A bond payable to an administrator as such is assets in the hands of an administrator *de bonis non*.³ But he cannot demand money collected by a predecessor in a foreign state;⁴ nor can he call a former administrator to account;⁵ nor has he the right to sell and convey titles to lands not disposed of by the will.⁶ In brief, it may be added that his powers and responsibilities are the same as those of a general administrator.⁷

§ 987. **Accounting by Executors and Administrators.** — The jurisdiction of the probate court to compel an accounting is unquestioned;⁸ but such liability is co-extensive only with the jurisdiction of the court which made the appointment.⁹

§ 988. **Form of Account.** — The account need not be made up in items of days and half-days; it is only sufficient to prove the amount of time actually spent in the duties of the office;¹⁰ and the executor or administrator is

Am. Dec. 622; *Magner v. Ryan*, 19 Mo. 196; *Rattoon v. Overacker*, 8 Johns. 126; *Shillaber v. Wyman*, 15 Mass. 322; *Priest v. Watkins*, 2 Hill, 225; 38 Am. Dec. 584.

¹ *Kelly v. Kelly*, 9 Ala. 908; 44 Am. Dec. 469; *Swink v. Snodgrass*, 17 Ala. 653; 52 Am. Dec. 190; *Gentry v. Owen*, 14 Ark. 396; 60 Am. Dec. 549; *Stubblefield v. McRaven*, 5 Smedes & M. 130; 43 Am. Dec. 502. See *Potts v. Smith*, 3 Rawle, 361; 24 Am. Dec. 359, and note 379.

² *Burnett v. Meadows*, 7 B. Mon. 277; 46 Am. Dec. 517.

³ *King v. Green*, 2 Stew. 133; 19 Am. Dec. 46.

⁴ *Dorsey v. Dorsey*, 5 J. J. Marsh. 280; 22 Am. Dec. 33.

⁵ *Green v. Byrne*, 46 Ark. 453; *Rowan v. Kirkpatrick*, 14 Ill. 1; *Searles v. Scott*, 22 Miss. 94.

⁶ *Aashburn v. Aashburn*, 16 Ga. 213.

⁷ *Shackelford v. Runyan*, 7 Humph. 141.

⁸ *Phillips v. State*, 5 Ohio St. 122; 64 Am. Dec. 635; *In re Fithian*, 44 Hun, 457.

⁹ *Motthland v. Wireman*, 3 Pen. & W. 185; 23 Am. Dec. 71.

¹⁰ *Cameron v. Cameron*, 15 Wis. 1; 82 Am. Dec. 652. But he must establish the items by strict proof if required: *Succession of Lee*, 4 La. Ann. 579. See *Estate of Sanderson*, 74 Cal. 199.

entitled *pro tanto* to the benefit of such of his accounts as are accurate and satisfactory;¹ but the account should be a detailed statement of the administration of the estate, and should show what has been received, and from what sources, what has been paid out, and for what purposes, and what balance, if any, remains;² and such statements must be so entered as to distinctly show every item received and expended.³

§ 989. Power of Court to Correct Prior Accounts. — The court of probate has power in its final decree settling an administration account to correct any errors made in any former and partial settlement of the account.⁴

§ 990. Compensation to Executors and Administrators. — The time for the allowance of compensation to an executor or administrator should be upon the final settlement of the estate,⁵ and such compensation for administering upon the estate should not be refused unless there is some loss occasioned to the estate by gross negligence or willful default of the executor or administrator.⁶ This compensation should be a reasonable sum for the duties imposed, and the executor or administrator has the right to retain such sum.⁷ What is a just and reasonable compensation depends upon the circumstances of each particular case.⁸ But the fact that the administrator lives at a distance does not entitle him to charge more for his

¹ *Duncan v. Tobin*, Cheves Eq. 143; 34 Am. Dec. 605.

² *Brown v. Howe*, 9 Gray, 84; 69 Am. Dec. 276. Proceeds of sale of realty under a power in the will must be accounted for: *Clark v. Clark*, 8 Paige, 152; 35 Am. Dec. 676.

³ *In re Jones*, 1 Redf. 263; *Hutchinson's Appeal*, 34 Conn. 300.

⁴ *Mix's Appeal*, 35 Conn. 121; 95 Am. Dec. 222; *Liddel v. McVickar*, 11 N. J. L. 44; 19 Am. Dec. 369; *Lucich v. Medin*, 3 Nev. 93; 93 Am. Dec. 376.

⁵ *Merrill v. Moore*, 7 How. (Miss.)

271; 40 Am. Dec. 60. See *Vanderheyden v. Vanderheyden*, 2 Paige, 287; 21 Am. Dec. 86.

⁶ *Stewart v. Stewart*, 31 Ala. 207; *Frey v. Frey*, 17 N. J. Eq. 71; *Powell v. Powell*, 10 Ala. 900; *Succession of Lee*, 4 La. Ann. 578; *Adams v. Westbrook*, 41 Miss. 385.

⁷ *Williamson v. Wilkins*, 14 Ga. 416; *Logan v. Troutman*, 3 A. K. Marsh. 66; *Fauntleroy v. Lyle*, 5 T. B. Mon. 266.

⁸ *Bendall v. Bendall*, 24 Ala. 295; 60 Am. Dec. 469.

services;¹ although he is entitled to claim more for extraordinary services.²

§ 991. Right to Commissions.—The executor or administrator must fully perform the duties of his trust, and is obliged to make returns according to law. If he neglects to do this, he is not entitled to commissions;³ nor is an executor entitled to commissions on a debt due the testator, and specifically bequeathed to him;⁴ nor will he be allowed commissions on funds of the estate not under his control and not administered;⁵ nor on the value of land not belonging to the estate, although inventoried and taken possession of;⁶ nor on property not inventoried;⁷ nor on the income of funds retained for a specific purpose set forth in the will;⁸ nor on debts not collected, although inventoried.⁹

§ 992. Allowances.—An administrator may be allowed a reasonable sum for his services in making out difficult and complicated accounts when the complication does not result from his own carelessness or negligence.¹⁰ They are also entitled to all reasonable charges and disbursements on account of the estate.¹¹

Expenses of education of infant heirs may be allowed.¹² An executrix should be allowed for sums paid for insurance on a house of which she had the life use under the

¹ *Watkins v. Romine*, 106 Ind. 378.

² *Harris v. Martin*, 9 Ala. 895;

Patterson v. Bell, 25 Iowa, 149;

O'Neill v. Donnell, 9 Ala. 734; *Reese*

v. Gresham, 29 Ala. 91.

³ *Wood v. Garnett*, 6 Leigh, 271;

Fall v. Simmons, 6 Ga. 265; *Black v.*

Blakely, 2 McCord Ch. 1; *Norris v.*

Morris, 4 Gratt. 29; *Kenan v. Hall*, 8

Ga. 417.

⁴ *Handy v. Collins*, 60 Md. 229; 45

Am. Rep. 725. But see *Granberry v.*

Granberry, 1 Wash. (Va.) 246; 1 Am.

Dec. 455. As to commissions on debts

due the estate, see *Stubblefield v. Mc-*

Raven, 5 Smedes & M. 130; 43 Am.

Dec. 502.

⁵ *Succession of Butterly*, 10 La. Ann. 258.

⁶ *In re Ricaud*, 70 Cal. 69.

⁷ *Succession of Macarty*, 5 La. Ann. 434.

⁸ *Solliday v. Bissey*, 12 Pa. St. 347.

⁹ *Mayberry's Appeal*, 33 Pa. St. 258.

¹⁰ *Hall v. Pegram*, 85 Ala. 523, 536.

But see *Jenkins v. Hanahan*, 1 Cheves Eq. 129.

¹¹ *Nimmo v. Commonwealth*, 4 Hen.

& M. 57; 4 Am. Dec. 488. See *Edelen*

v. Edelen, 11 Md. 415; *In re Wilson*,

2 Pa. St. 325; *Pearson v. Darri gton*,

32 Ala. 227.

¹² *Hening v. Connor*, 2 Bibb, 188.

will, with directions to keep it in repair, though taxes paid out thereon should not be allowed.¹ Money expended for a tombstone should be allowed.² Though horse-feed and dinners furnished to persons attending the funeral are not proper matters for allowance.³ The reasonable expenses of administration should be allowed.⁴ So should necessary repairs on a house.⁵ So should necessary expenses incurred in defending what the executor believes to be unjust claims against the estate.⁶

ILLUSTRATIONS. — The executor took the testator's child into his family, instead of permitting him to remain with the widow to be supported out of the income. *Held*, that he could not charge for the expense: *Clark v. Clark*, 8 Paige, 152; 35 Am. Dec. 676.

§ 993. Charges against Executors and Administrators.

— An administrator is chargeable on final settlement with any occupation or use of the realty or other property of the estate which is not properly an official act.⁷ But he is not chargeable, in his official capacity, with timber, coal, and limestone taken from the testator's land where he occupied the same as a tenant of the life tenant;⁸ nor may he be charged with the rental value of land after a foreclosure sale of the premises.⁹ But he should be charged with a debt due the estate from him, which he failed to pay when solvent.¹⁰ So he is chargeable with interest on funds with which he mingled his own, and used both indiscriminately, and the time from which interest should be computed is that from which the funds were so mingled.¹¹

¹ *Wiggin v. Levett*, 6 Met. 194; 39 Am. Dec. 716.

² *Bendall v. Bendall*, 24 Ala. 295; 60 Am. Dec. 469.

³ *Shaeffer v. Shaeffer*, 54 Md. 679; 39 Am. Rep. 406.

⁴ *Henderson v. Simmons*, 33 Ala. 291; 70 Am. Dec. 590.

⁵ *Id.*

⁶ *Green v. Fagan*, 15 Ala. 335; *Harris v. Parker*, 41 Ala. 604; *Effinger v.*

Richards, 35 Miss. 540; *Holmes v. Holmes*, 28 Vt. 765.

⁷ *Henderson v. Simmons*, 33 Ala. 291; 70 Am. Dec. 590.

⁸ *Lynn's Appeal*, 31 Pa. St. 44; 72 Am. Dec. 721.

⁹ *Walls v. Walker*, 37 Cal. 424; 99 Am. Dec. 290.

¹⁰ *Condit v. Winslow*, 106 Ind. 142.

¹¹ *Griswold v. Chandler*, 5 N. H. 492; *Union Bank of Georgetown v.*

§ 994. **Allowance of Counsel Fees.**— Counsel may be employed by an executor or administrator whenever necessary, or when required for the benefit of the estate, or when requisite to assist him in his official duties, unless he engages in useless, unnecessary, and vexatious litigation, in which latter case they will not be allowed.¹

§ 995. **Liability of Executors and Administrators.**— Executors and administrators are liable for all assets of decedent received by them, whether with or without authority.² They are also liable for debts lost to the estate through their gross negligence in enforcing payment.³ So they are liable for any loss which results to the estate by reason of negligence in fulfilling the duties of the office, or in the management of the property of the estate, or for any active or passive breach of duty resulting in loss to the estate, or for non-feasance or misfeasance, or for any misapplication of the assets of the estate made without an order of court, subject always, however, in such cases, to the rules that the care required of them of property in their possession must be graduated according to its character, its value, and the convenience of its being

Smith, 4 Cranch C. C. 509; Dunscomb v. Dunscomb, 1 Johns. Ch. 508; 7 Am. Dec. 504; Jacob v. Emmett, 11 Paige, 142. See note to Walls v. Walker, 99 Am. Dec. 296, as to when interest should be charged.

¹ Young v. Kennedy, 95 N. C. 265; Bendall v. Bendall, 24 Ala. 295; 60 Am. Dec. 469; Compton v. Barnes, 4 Gill, 55; 45 Am. Dec. 115; Lucich v. Medin, 3 Nev. 93; 93 Am. Dec. 376. As to counsel fees in establishing a will, see McClellan v. Hetherington, 10 Rich. Eq. 202; 73 Am. Dec. 89; Henderson v. Simmons, 33 Ala. 291; 70 Am. Dec. 590. As to attorney who is administrator, see Willard v. Bassett, 27 Ill. 37; 79 Am. Dec. 393; Succession of Key, 5 La. Ann. 567; Clark v. Knox, 70 Ala. 607; 45 Am. Rep. 93. As to employing law partner, see Bendall v. Bendall, 24 Ala. 295; 60 Am. Dec. 469. Attorney to assist in

settlement, see Callaghan v. Grenet, 66 Tex. 236; Snigley v. Reese, 53 Ala. 89; 25 Am. Rep. 598. As to employment of agents and clerks, see Henderson v. Simmons, 33 Ala. 291; 70 Am. Dec. 590; Vanderheyden v. Vanderheyden, 2 Paige, 287; 21 Am. Dec. 86. As to employment of more counsel than necessary, see Crowder v. Shackelford, 35 Miss. 321; Estate of Nicholson, 1 Nev. 518. Employing different counsel from that named in will, see Young v. Alexander, 16 Lea, 108. Payment of counsel fees as prerequisite to allowance, see Modawell v. Holmes, 40 Ala. 391; Succession of Holbert, 3 La. Ann. 436; Thacher v. Dunham, 5 Gray, 26.

² Fletcher v. Sanders, 7 Dana, 345; 32 Am. Dec. 96.

³ Charlton's Appeal, 34 Pa. St. 473; 75 Am. Dec. 673.

made secure from loss by theft, fire, and the like, and that only such care and diligence is required of them as prudent men exercise in the direction of their own affairs, since it is not contemplated that such trustees should be insurers against misfortunes and casualties which ordinary prudence, sagacity, and diligence could not prevent.'

Collusion renders the executor liable.² So does the neglect to interpose an available defense to an action at law.³ The representative is liable for the proceeds of property sold on credit.⁴ He is also liable where he sells property exempt from sale;⁵ or pays debts out of their legal order or proportion;⁶ or promises to pay his testator's debt and has assets at the time;⁷ or where he, as executor of a deceased partner, carries on the business with the surviving partners.⁸ And an executor has no right to give away stocks because he considers them worthless.⁹ He is also liable for rents unlawfully collected, although used as assets in paying the debts of the estate.¹⁰

An administrator is chargeable with loss of proceeds of

¹ Rubottom v. Morrow, 24 Ind. 202; 87 Am. Dec. 324; Mikell v. Mikell, 5 Rich. Eq. 220; Cook v. Sanders, 15 Rich. 63; 94 Am. Dec. 139; State v. Meagher, 44 Mo. 356; 100 Am. Dec. 298; Estate of Secondo Bosio, 2 Ashm. 437; Fisher v. Skillman, 18 N. J. Eq. 229; Flory v. Becker, 2 Pa. St. 470; 45 Am. Dec. 610; Sims v. Sims, 10 N. J. Eq. 158; Holcombe v. Holcombe, 13 N. J. Eq. 413; Irwin's Appeal, 35 Pa. St. 294; Hengst's Appeal, 24 Pa. St. 413; McDowall v. McDowall, 1 Bail. Eq. 324; note to Thomas v. White, 14 Am. Dec. 65; Rubottom v. Morrow, 87 Am. Dec. 326; Taveau v. Ball, McCord Ch. 356; Williams v. Matiland, 1 Ired. Eq. 92; Voorhees v. Stoothoff, 11 N. J. L. 145; Holderness v. Palmer, 4 Jones Eq. 107; Whitted v. Webb, 2 Dev. & B. Eq. 442. As to liability in foreign jurisdiction, see note to McNamara v. Dwyer, 32 Am. Dec. 632. That an administrator is not liable as such after final distribution, see Beardsley v. Knight, 10 Vt. 185; 33 Am. Dec. 193; Easterling v. Blythe,

7 Tex. 210; 56 Am. Dec. 45; Lowry v. McMillan, 35 Miss. 147; 72 Am. Dec. 119. The amount of assets which come into the hands of an executor *de son tort* governs his liability: Cook v. Sanders, 15 Rich. 63; 94 Am. Dec. 139; Leach v. House, 1 Bail. 42; Hill v. Henderson, 13 Smedes & M. 688; Mitchell v. Lunt, 4 Mass. 654.

² Murray v. Blatchford, 1 Wend. 583; 19 Am. Dec. 537.

³ Gold v. Bailey, 44 Ill. 491; 92 Am. Dec. 190.

⁴ Giddings v. Steele, 28 Tex. 733; 91 Am. Dec. 336.

⁵ Jackson v. Bryan, 3 J. J. Marsh. 308; 20 Am. Dec. 142.

⁶ Lenoir v. Winn, 4 Desaus. Eq. 65; 6 Am. Dec. 597.

⁷ Sleighter v. Harrington, N. C. Term Rep. 249; 7 Am. Dec. 715.

⁸ Alsop v. Mather, 8 Conn. 584; 21 Am. Dec. 703.

⁹ Estate of Radovich, 74 Cal. 536; 5 Am. St. Rep. 466.

¹⁰ Conger v. Atwood, 28 Ohio St. 134; 22 Am. Rep. 362.

a draft payable to him as administrator, where he indorses it for collection and places it in the hands of persons whom he does not know to be responsible.¹ He is also liable for failure to promptly secure a crop when its hazardous situation requires it.² And is liable for the loss of the proceeds of a note caused by the misappropriation of his collecting agent.³ Such representative is not liable for distribution made in accordance with a construction by the court of the will of deceased, although such construction was erroneous.⁴ And where the testator had invested in bank stock which the executor, in good faith, allowed to remain, he was held not liable.⁵ They are not liable for robbery and misappropriation of moneys directed to be invested under the will as trust funds, where the investment was made in government and state bonds deposited in a bank vault and labeled as trust funds.⁶

ILLUSTRATIONS. — Money belonging to the estate was stolen from the administrator without his fault. *Held*, not liable: *Stevens v. Gage*, 55 N. H. 175; 20 Am. Rep. 191. In payment of three legacies of one thousand dollars each, an executor delivered three one-thousand-dollar United States interest-bearing bonds worth everywhere twelve hundred dollars each. *Held*, negligence for which he was liable: *Spaulding v. Wakefield's Estate*, 53 Vt. 660; 38 Am. Rep. 709. An executor gave his official promissory note for his testator's debts due "for medical service, rendered most of which during last illness," at the time the claim was barred by the statute of limitations. *Held*, liable: *McGrath v. Barnes*, 13 S. C. 328; 36 Am. Rep. 687.

§ 996. Liability for Interest on Funds of Estate. — An executor or administrator may be charged with interest on the funds of the estate where there is great and unnecessary delay in making the final settlement.⁷ So in-

¹ *Davis v. Chapman*, 83 Va. 67; 5 Am. St. Rep. 251.

² *Cooper v. Williams*, 109 Ind. 270.

³ *McCloskey v. Gleason*, 56 Vt. 264; 48 Am. Rep. 770.

⁴ *Fraser v. Page*, 82 Ky. 73.

⁵ *Parker v. Glover*, 42 N. J. Eq. 559.

⁶ *Carpenter v. Carpenter*, 12 R. I. 544; 34 Am. Rep. 716.

⁷ *Estate of Sanderson*, 74 Cal. 199; *Johnson's Adm'r's v. Hedrick*, 33 Ind. 129; 5 Am. Rep. 191.

terest may be charged against such representative where he allows trust moneys in his hands to lie idle;¹ so it may be charged where he used the funds in his private business.² But he is not so liable where he pays over the funds within a reasonable time to those entitled to them.³ So he is liable for interest accruing on claims allowed against the estate which bear interest,⁴ and interest is chargeable where he has been guilty of negligence in not putting out money of the estate.⁵ He is also liable for interest where he is grossly negligent in collecting debts due the estate.⁶

§ 997. Rights of the Widow as to Mansion-house.—The right of a widow to remain in the mansion-house of her deceased husband, when provided by statute, is not restricted to a personal continuance in the house merely, but she is entitled to a reasonable enjoyment of the premises, and may therefore either personally occupy them or rent them.⁷

§ 998. Allowance to Widow and Family.—An allowance out of the personal estate is generally made to the widow and the immediate family of the deceased, adequate to their necessary and comfortable maintenance during the settlement of the estate, governed by the value of the estate and the situation in life of the parties.⁸

¹ *Frey v. Frey*, 17 N. J. Eq. 71; *Walls v. Walker*, 37 Cal. 424; 99 Am. Dec. 290. As to interest on funds used in carrying on testator's business, see *Weir v. Weir*, 3 B. Mon. 645; 39 Am. Dec. 487.

² *Walls v. Walker*, 37 Cal. 424; 99 Am. Dec. 290.

³ *Lynn's Appeal*, 31 Pa. St. 44; 72 Am. Dec. 721.

⁴ *Finley v. Carothers*, 9 Tex. 517; 60 Am. Dec. 179.

⁵ *Fox v. Wilcocks*, 1 Binn. 194; 2 Am. Dec. 433; *Duncomb v. Duncomb*, 1 Johns. Ch. 508; 7 Am. Dec. 504.

⁶ *Shultz v. Pulver*, 3 Paige, 182; *Succession of Baum*, 9 La. Ann. 412; *Shaffer's Appeal*, 46 Pa. St. 131;

Southall v. Taylor, 14 Gratt. 269; *Brandon v. Judah*, 7 Ind. 545; *Brazeale v. Brazeale*, 9 Ala. 491; *Smith v. Hurd*, 8 Smedes & M. 682; *Cartwright v. Cartwright*, 4 Hayw. 134; *Holcomb v. Holcomb*, 11 N. J. Eq. 281; *Jennings v. Weeks*, 1 Rice, 452.

⁷ *Conger v. Atwood*, 28 Ohio St. 134; 22 Am. Rep. 362. See *Huey v. Huey*, 26 Iowa, 526; *Davenport v. Davenaux*, 45 Ark. 341; 1 *Woerner on American Law of Administration*, sec. 202; *Schouler on Executors and Administrators*, sec. 457.

⁸ *Johnson v. Corbett*, 11 Paige, 265; *Schouler on Executors and Administrators*, secs. 448 et seq. See also *Phelps v. Phelps*, 72 Ill. 545; 22 Am.

§ 999. **Presentation of Claims.**—A formal presentation of a claim against an estate is not necessary. It is only requisite that the creditor should in some way bring his claim to the knowledge of the executor or administrator. Formal pleadings are not required.¹ It is sufficient if the representative has notice or knowledge of the claim.² So the affidavit of claim may be made by an agent of the creditor in certain cases.³

§ 1000. **What Constitutes an Acknowledgment of a Claim.**—Where an administrator neither allows nor rejects a claim, but refers the same by indorsement thereon to the probate court's decision, this amounts to the rejection of the claim.⁴ So a claim must be presented although the executor verbally stated to the creditor that the claim would be paid and it was all right.⁵ But it is held in Alabama that an acknowledgment that the claim was duly presented is evidence of such fact.⁶

§ 1001. **Mortgage Claims.**—It is held that statutory limitations as to time, governing the presentation of claims, do not apply to mortgage claims,⁷ and that where the mortgage, having been recorded, recites such claim, the executor or administrator is bound.⁸

§ 1002. **Time Limitations in Statutes as to Presentation of Claims.**—Statutory requirements as to the time

Rep. 149; *Baker's Appeal*, 56 Conn. 586. Postponing allowance: See *Dennis's Estate*, 67 Iowa, 110. Precedence over liens: See *Giddings v. Crosby*, 24 Tex. 295. Additional allowance: See *Robert's Estate*, 67 Cal. 349. How affected by remarriage: See *Hamilton's Estate*, 66 Cal. 576. How affected by widow opposing will: *Pearson v. Darrington*, 32 Ala. 227.

¹ *Brown v. Brown*, 56 Conn. 249, 251; *Hammett v. Starkweather*, 47 Conn. 439; *Tolle's Appeal*, 54 Conn. 521; *Phillips v. Russell*, 24 Mo. 527. See *Tebbetts v. Tilton*, 31 N. H. 273; *Beene v. Phillips*, 37 Ala. 312; *Baker v. Chittucks*, 4 G. Groene, 480.

² *Ellis v. Carlisle*, 8 Smedes & M. 552;

Little v. Little, 36 N. H. 224; *Trigg v. Moore*, 10 Tex. 197.

³ *Peter v. King*, 13 Mo. 143.

⁴ *Bellows v. Cheek*, 20 Ark. 424.

⁵ *Lewis v. Champion*, 40 N. J. Eq. 59.

⁶ *Grimball v. Mastin*, 77 Ala. 553.

⁷ *Allen v. Moer*, 16 Iowa, 307. See *Austin v. Jackson*, 10 Vt. 267; *Menard v. Marks*, 1 Scam. 25; *Lacke v. Palmer*, 26 Ala. 312; *McMurray v. Hooper*, 43 Pa. St. 468; *Fisher v. Mossman*, 11 Ohio St. 42.

⁸ *Trustees of Jefferson College v. Dickson*, 1 Freem. Ch. 474. See *Baldwin v. Tuttle*, 23 Iowa, 66; *Miller v. Helm*, 2 Smedes & M. 687. But see *Ellissen v. Hallock*, 6 Cal. 386.

within which claims against the estate of the deceased must be presented, or in which a suit in such claims must be brought, are imperative and must be strictly followed.¹

§ 1003. **Claims under Ancillary Administration.**—Non-resident creditors have the right to prove their claims under an ancillary administration.²

§ 1004. **Executors and Administrators as Creditors.**—The personal representative is entitled to give a preference to his own debts where he is himself a creditor, except those which are of greater dignity.³ Therefore, he may retain for such debt,⁴ unless barred by the statute of limitations.⁵ But it is held that an executor *de son tort* may not retain for his own debt.⁶

§ 1005. **Extinguishment of Executor's or Administrator's Debt by his Appointment.**—This is a question largely depending on the statutes of the several states. It would seem, however, that at common law such debt is extinguished by the very force of the appointment, although it seems that this question in American law is rather one of remedy than otherwise, since such debts are held generally to be assets in the hands of such representatives, which must be accounted for as such.⁷

¹ Cawthorne v. Weisinger, 6 Ala. 714; Jones v. Pharr, 3 Ala. 283. Examine also Wingate v. Pool, 25 Ill. 118; Bank of Montgomery v. Plattner, 37 Ala. 222; Thurston v. Lowder, 47 Me. 72; Demmy's Appeal, 43 Pa. St. 155; French v. Davis, 38 Miss. 218; Jennings v. Browder, 24 Tex. 192; Danglada v. De la Guerra, 10 Cal. 386; Preston v. Day, 19 Iowa, 127; Walker v. Cheever, 39 N. H. 420.

² Miner v. Austin, 45 Iowa, 221; 24 Am. Rep. 763.

³ Page v. Patton, 5 Pet. 304; White v. Griffin, 2 Jones, 3; Buckner v. Morris, 2 J. J. Marsh. 121.

⁴ Hosack v. Rogers, 6 Paige, 415;

Hassell v. Griffin, 2 Jones Eq. 117. See Clark v. Clark, 8 Paige, 152; 35 Am. Dec. 676; Romig v. Erdman, 5 Whart. 112; 34 Am. Dec. 533.

⁵ Batson v. Murrell, 10 Humph. 301; 51 Am. Dec. 707; Rogers v. Rogers, 3 Wend. 503; 20 Am. Dec. 716.

⁶ Partee v. Caughran, 9 Yerg. 460. See Cook v. Sanders, 15 Rich. 63; 94 Am. Dec. 139; 2 Woerner on American Law of Administration, secs. 377 et seq.

⁷ Winship v. Bass, 12 Mass. 199; Griffin v. Bonham, 9 Rich. Eq. 71; Griffith v. Chew, 8 Serg. & R. 17, 33; 11 Am. Dec. 556; Rader v. Yeargin, 85 Tenn. 486. See 2 Woerner on American Law of Administration, secs.

§ 1006. **Distribution to be Made under Law of the Domicile.** — The law of the place where the deceased was domiciled at his death governs in making distribution among the heirs or legatees,¹ and the *lex rei sitæ* governs in cases of ancillary administration and the payment of debts there.²

§ 1007. **Distribution in Case of Non-resident Creditors of Insolvent Estate.** — It is held in Texas that a creditor of an insolvent estate resident in another state of the Union is entitled to share in the distribution of the estate *pari passu* with the creditors of the same degree who are residents of the state where the distribution is made, in the absence of evidence that he has received anything from assets elsewhere.³

§ 1008. **Powers of Court are Exhausted after Distribution.** — The powers of a court of probate are exhausted after it has made an order of distribution, and it then has no jurisdiction to entertain an original petition brought to enforce the collection of the amount awarded to the distributee as a debt against the administrator.⁴

311 et seq., where the statutes of the several states are considered; and see also *Bacon v. Fairman*, 6 Conn. 121; *Moore v. Miller*, Phill. Eq. 359; *Hall v. Pratt*, 5 Ohio, 72; *Gardner v. Miller*, 19 Johns. 188; *Tracy v. Card*, 2 Ohio St. 431.

¹ *Stevens v. Gaylord*, 11 Mass. 256; 2 *Woerner on American Law of Administration*, sec. 565; *Goodall v.*

Marshall, 11 N. H. 88; 35 Am. Dec. 472; *Tucker v. Condry*, 10 Rich. Eq. 12; *Churchill v. Prescott*, 3 Bradf. 233; *Ennis v. Smith*, 14 How. 400, 425.

² Cases in preceding note.

³ *Tylor v. Thompson*, 44 Tex. 497; 23 Am. Rep. 600.

⁴ *McLaughlin v. McLaughlin*, Ohio St. 508; 64 Am. Dec. 603.

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